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CURRENT TOPICS

The Common Serjeant

THE pleasure felt by practitioners at the London Sessions and the Old Bailey at the promotion of the popular chairman of the County of London Sessions to the office of Common Serjeant is tempered by regret at the retirement of Sir HUGH BEAZLEY from that office. Sir Hugh is now seventy-three, and we wish him many happy years of retirement. He was educated at Cheltenham and Oriel College, Oxford, and was called to the Bar in 1905. He served in France with the King's Liverpool Regiment in the first world war. He was county court judge on Circuit No. 16 (Hull and East Riding of Yorks) from 1927 to 1934 and on Circuit No. 38 (Middlesex, Essex and Herts) from 1934 to 1937, and judge of the Mayor's and City of London Court from 1937 to 1942. Mr. EDWARD ANTHONY HAWKE, who succeeds him, was, prior to his appointment as chairman of the County of London Sessions in 1950, senior prosecuting counsel for the Crown from 1945 to 1950. He was Recorder of Bath from 1939 to 1950 and deputy chairman of the County of Hertford Quarter Sessions from 1940 to 1950.

Charitable Trusts

THE Charitable Trusts (Validation) Bill, read a first time in the House of Lords on 1st December, proposes to give effect to recommendations in the Nathan Report on Charitable Trusts by validating certain trusts contained in instruments taking effect before the date of the publication of the report. The trusts in question are to be treated as charitable trusts, and as having at all times been so. The whole of a trust's objects will be treated as charitable up to the passing of the Bill. Past application of the trust property for non-charitable purposes will be validated, but, for the future, a trust's objects are to be restricted to such of their purposes as are charitable under the ordinary law. The Bill does not apply to trusts which have been treated as invalid before 16th December, 1952, because they contain a non-charitable element. The rights of persons who may have a claim to property which is the subject of an imperfect trust provision on the ground of its invalidity are protected. Such persons must show that the right accrued on a date not more than six years before 16th December, 1952. The claim will usually have to be brought within one year of the date of the passing of the Bill.

Rights of Light

MEMBERS of The Law Society who have knowledge of actual cases in which, owing to the results of the war, property has become subject to an easement of light in favour of neighbouring property, with serious effects on the possibility of development, are invited in the current issue of the *Law Society's Gazette* to supply the Secretary with details. New sources of light have been opened up by the destruction of buildings, the Council say, and statutory restrictions have prevented the erection of buildings and hoardings, and this makes it difficult or impossible to interrupt the prescription period (cf. an article at 92 SOL. J. 121). In 1947 the ATTORNEY-GENERAL said that, as far as he knew, very few instances of

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the acquisition of easements of light in the circumstances referred to were likely to arise, and no substantial case for legislation had been made out, but added that he was prepared to reconsider the matter if a sufficient number of cases of hardship were brought to his notice. With this in view a circular letter was sent to all local law societies in April, 1948, requesting details of actual or potential cases of hardship. Many replies were received, but only one or two cases of hardship were reported. The Council believe that the situation may now have altered and would welcome further information.

The Divorced Wife and the Rent Acts

WE are indebted to a correspondent for the following note which may be of some interest to readers: "The right of a wife to occupy the matrimonial home, particularly during the period of a divorce petition, has engaged the attention of the courts with ever-increasing frequency during the post-war years. Not unnaturally, a number of the decisions have directly concerned the law of landlord and tenant and more specifically the Rent Acts. In this connection, a not unimportant point of procedure may be involved. An ex-husband, as a statutory tenant of premises, may, without giving up possession in the sense of the Rent Acts, leave his divorced wife in occupation although the licence, of whatever nature it be, may be revoked by the husband as the decree of divorce will entitle him so to do. This in fact was decided in *Vaughan* v. *Vaughan* [1953] 1 W.L.R. 236 [*ante*, p. 65]. In these circumstances, it is vital that the landlord bring his action for possession either against the ex-husband or the parties jointly. Should he unwittingly seek his rights against the present occupier he may find his claim frustrated. If the landlord elects to proceed under Ord. 14 he will be met with this technical defence upon which an unconditional leave to defend will be granted, thus giving the defendant time to make alternative arrangements up till the date of trial, by which time the plaintiff will have amended his statement of claim. In these days of limited accommodation, the time gained for the defendant in these circumstances will be of inestimable value and the landlord will be postponed in obtaining possession of his property."

Enquiries of Local Authorities

THE current issue of the *Law Society's Gazette* contains the news that the separate form of enquiries normally accompanying requisitions for official certificates of search for use with the Metropolitan Borough Councils has now been agreed. Con. 29D, as it will be called, is to be published by The Solicitors' Law Stationery Society and is to come into operation on 1st January, 1954. The new form contains fifteen enquiries and the fees are the same as those for the enquiries in Part I of Forms Con. 29A (Borough and District Councils) and Con. 29C (County Borough Councils). It is hoped that the form for the London County Council will be settled in the near future.

Practice in the Chancery Division

MR. JUSTICE WYNN PARRY told counsel in the course of a case in the Chancery Division on 2nd December (*The Times*, 3rd December) that his affidavits were not in order, because sums of money mentioned in affidavits were expressed in words, and not, as they should have been, in figures. His lordship refused to read the affidavits and said: "The case can stand over and your clients will pay the costs of the adjournment." Although a correspondent elsewhere in this issue deplores this action, the practice is a long-standing one introduced in 1923 (see 84 SOL. J. 65).

County Court Rules Amended

A NUMBER of miscellaneous amendments are made to the County Court Rules by the County Court (Amendment) Rules, 1953 (S.I. 1953 No. 1728 (L. 13)), which come into operation on 1st January, 1954. Among the provisions affected are Ord. 7, r. 1 (2) (abandonment of excess where claim exceeds £100 or £200); Ord. 8, r. 14 (service of summons on partners); Ord. 11, r. 1 (payment into court in satisfaction of claim); Ord. 15, rr. 7, 8 (references to "£100" in these rules to be changed to "£200"); Ord. 25, r. 75 (warrants of delivery); Ord. 28, r. 16 (3) (affidavit of applicant in interpleader proceedings); and Ord. 47, r. 15 (1) (scale of costs where notice of discontinuance has been given). A new r. 11 to Ord. 25 is inserted, providing for the return to the home court of suspended warrants of execution which have been sent to a foreign court. A number of forms are also amended and certain new forms prescribed. Also coming into force on 1st January, 1954, are the County Court Funds Rules, 1953 (S.I. 1953 No. 1710 (L. 11)) which revoke and replace the similarly named rules of 1949 and 1950. The new rules make provision for transfer from the deposit account (carrying interest at 2½ per cent.) to an investment account (carrying interest at 3 per cent.) of moneys paid into court and not likely to be required for payment out within six months.

Statutory Instruments

A REPORT by the Select Committee on Delegated Legislation, published on 30th November, has been attacked by the *Observer* of 6th December as "disappointing," "negative" and "almost a confession of defeat." At present a statutory instrument may be either accepted or wholly rejected by Parliament. It is rarely rejected. It can never be amended. The committee declined to recommend that Parliament should be empowered to amend, both because it would take up too much time, and because there was no need for it. It is no longer true, the newspaper says, that Parliament lays down the policy and a subordinate authority fills in the details as stated by the report. In modern times statutory instruments are in some cases the equivalent of new legislation, and the *Observer* gives as an example the direction of labour imposed five years ago by an order made under the Supplies and Services Acts of 1945 and 1947. There should, it is suggested, be some means of distinguishing major and minor regulations, as proposed in LORD SAMUEL'S Liberties of the Subject Bill. The *Observer* comments that the report does not seem to appreciate the seriousness of the issue involved.

Voluntary Legal Aid

A VOLUNTARY legal aid scheme which is to be commenced by a committee appointed by the Hertfordshire branch of the National Farmers' Union deserves a word of encouragement and commendation from lawyers. It is proposed to put the scheme into operation when 500 members have been enrolled. There is to be a nominal yearly subscription, and members will receive free legal advice, and representation in court and in courts of inquiry. Insurance companies, trade unions and motoring organisations have been successfully operating their own schemes of free legal representation in court within the limits of their objects for many years past. Much remains to be done before all sections of the public have their own voluntary schemes, and there is no reason why the example of the Hertfordshire branch of the Farmers' Union should not be widely copied. Whether there is scope for such organised self-help in the legal profession is a matter which may well merit investigation.

ENQUIRIES OF LOCAL AUTHORITIES: A CRITICISM AND A SUGGESTION

THE statement in the September issue of the *Law Society's Gazette* introducing the new forms of enquiries of local authorities said, *inter alia*: "The number of enquiries on each form has of necessity considerably increased as compared with the current edition published in 1949." But was it really necessary to increase the number?

The answer to this question is important because an increase in the number of enquiries leads to two results, first, an increase in the fees for answering them, and, secondly, delay in sending the answers. The first result accompanied the introduction of the forms, the second result will vary from authority to authority. Delays were often bad enough with the old forms. To quote the Report of the Committee on Local Land Charges (Cmd. 8440), para. 69: "Though we have had no complaints of delays in registration, we have had many complaints of delays in issuing an official certificate of search . . . That a considerable interval sometimes elapses between the requisition for a search and the issue of a certificate is admitted by the registrars." The reason for the delay is then ascribed to the time and trouble that has to be spent in compiling the answers to the supplementary enquiries. With the increase in enquiries the delay will increase, or, alternatively, the enquiries may be answered in a perfunctory and unsatisfactory way.

To the client the greatest economy and speed in completing his transaction consonant with reasonable protection of his interests is important, and the solicitor is liable to be blamed if either is lacking. Speed is particularly important where two or three persons are pursuing the same property. Ability to obtain answers by return of post to the really important enquiries may save losing the property or buying it with the risk that the answers may be unsatisfactory.

It is difficult to avoid feeling that the framers of the new enquiries have set about their task in an academic, rather than a practical, frame of mind with the object of securing every piece of information which the local authority has about the property irrespective of its value to the client, though it may be remarked, incidentally, that they have omitted what might in some cases be an important enquiry as to unregistered conditions in interim development and other permissions granted before 1st July, 1948 (see 97 SOL. J. 629).

Enquiry 17 on form Con. 29A (13 on Con. 29B and 18 on Con. 29C) is an example. This is in substance a three-part question asking first, whether there are any entries relating to the property in the register kept under the Town and Country Planning (Control of Advertisements) Regulations, 1948, secondly, whether any challenge notice is outstanding under these Regulations, and thirdly, whether the property is in an area of special control under these Regulations. According to the statement in the *Law Society's Gazette* quoted at the beginning of this article, Pt. I of the new forms of enquiries (in which enquiry 17 is included) contains those enquiries "which are appropriate to most purchases of house property." Can it really be said that enquiry 17 is either necessary or appropriate in the case of a purchase of house property? A man buying a semi-detached house for his own family to live in is unlikely to be very interested in the answer to any part of this question and certainly is unlikely to be deterred from buying it because it is in an area of special control. And yet this question, which admittedly has descended from the last edition, continues to be asked daily in hundreds of cases where it can have no possible practical significance, and thus causes unnecessary labour, expense and delay.

It is true that Pt. I of the form is headed with a note: "Inappropriate enquiries should be deleted." This instruction is, however, more honoured in the breach than in the observance, and the writer would hazard a guess that enquiry 17, for instance, is deleted in well under 1 per cent. of forms sent in. Indeed, there is no incentive for the solicitor or, as it will generally be, his clerk, to waste time in going through the print deleting inappropriate enquiries. He obtains no reduction in the fee nor any guarantee that his enquiries will be answered more quickly. Additionally, the solicitor or his clerk may be loth to delete an enquiry which The Law Society have approved in case of possible liability for negligence in so doing.

What is wanted, in the writer's opinion, to obtain economy and speed and freedom from anxiety for the solicitor is a short form of enquiries for the normal case approved by The Law Society which the local authority associations will recommend their members to answer within a maximum period of two days from receipt at a fee not exceeding that previously payable and possibly less. The long forms now approved could be retained for optional use by solicitors in difficult or abnormal cases.

As mentioned above, the Pt. I enquiries in the present form profess to be those appropriate to most purchases of house property, and in considering what questions might qualify for the short form it is therefore reasonable to take a purchase of house property as the normal case.

Most houses are purchased for the purpose of being lived in by the purchaser, though some are purchased as investments, but, whichever the purpose, the main concern of the purchaser is probably that he will not be disturbed in his possession, or, as the case may be, receipt of the rents and profits, of his house. The enquiries of first importance are, therefore, those relating to possible future action, that is (taking the county borough form Con. 29C), enquiry 12 relating to the development plan, enquiry 13 relating to road proposals, enquiry 19 relating to compulsory purchase orders, and, less likely to arise but still important, enquiry 2 relating to trunk and special road proposals. Secondly, the purchaser will want to have notice of any large future capital commitment. Under this head, enquiry 1 as to the status of the road on which the property abuts clearly qualifies. Also, enquiry 4, as to outstanding notices, though the writer would limit this to formal notices as in the previous edition of the forms; the description "informal notice" is a very vague phrase which might comprise a multitude of different warnings given by any of a number of officers of a large authority, and is therefore liable to provoke delay. The essence of being able to obtain a quick answer is that the matters searched for should fall within a reasonable compass so as to be capable of being centrally indexed, thus avoiding reference of the enquiries to numerous departments and officers.

Thirdly, there is the question of enforcement notices, infringement of building byelaws and planning permissions, enquiries 9, 10 and 14. In the case of the average dwelling this is of little importance. No authority is going to allow a house to be put up completely unless it complies with planning control and building byelaws, or, if it is so foolish as to do so, it is unlikely to order it to be pulled down or materially altered. Any proposed enforcement notice is likely to relate to comparatively minor matters such as an unauthorised

access. Planning permissions may contain conditions and, therefore, have a certain importance. Under this third head it is suggested that only enquiry 14 as to entries in the register of planning applications should qualify.

Where the house is being bought for investment, enquiry 8 as to entries made in the registers kept under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, may be important, so that this enquiry might be included in the short form also.

This gives a total of eight questions, which should be capable of being answered within two days; indeed, once arrangements have been made for the information required to answer them to be centrally indexed either on a map or otherwise, the answers should readily be sent by return. A reasonable fee for the eight questions might well be 5s.

No doubt protagonists for the necessity of other enquiries would be readily forthcoming, but one must always weigh speed and economy, which are the interest of the majority, against the expense and delay attendant upon covering every exceptional case.

So much for the writer's positive suggestions as to what should be included in a new short form for normal use. There are a number of other enquiries in Pt. I of the new forms which have not been mentioned, and some comment as to why they have not been mentioned may not be out of place.

All the enquiries were fully explained in an article at 97 Sol. J. 644, 662, 674 and 689, so that it is unnecessary to set out the enquiries and the reasons behind them in any detail here. Taking the county borough form again, Con. 29C, the first enquiry not mentioned above is the two-part enquiry 3, as to controlled land. The first part of the enquiry is, incidentally, worded in a most peculiar way: "Is the property controlled land . . ." It would be an odd property that was entirely made up of controlled land, and the words "any part of" should surely have been inserted after the word "Is". Now, as shown in the earlier article, to be controlled land, land must be either held by the street authority, or the subject of an authorisation for compulsory acquisition, or lie in front of a prescribed improvement line. Land on which there is an existing building is in any case excluded. If any of these qualifications for being controlled land exist, and they should be ascertainable from the investigation of title, enquiry 19, or the official certificate of search, without asking this further question, then the purchaser will purchase on the assumption that the land is in any case lost to him and will not be worried about statutory undertakers' works on it.

The next enquiry not mentioned earlier is enquiry 5 as to the existence of a sewer within 100 feet. Is the answer to this question likely to weigh with the purchaser in deciding whether or not to purchase the house? Most purchasers will be interested in knowing whether a house is connected to the main sewer or not, though they will generally have found this out for themselves, but they will take the house as they find it, and it is difficult to imagine that the answer to this enquiry will make anyone want to escape from his bargain or ask for a reduction in price. Therefore, it seems unimportant for an existing house.

Then there is enquiry 6 as to combined drains. Here the writer would simply echo the words of the writer of the earlier article (97 Sol. J., at p. 663): "It is unlikely that a prospective purchaser will be concerned, whatever may be the answer to this question, . . ."

Next, enquiry 7, as to whether the property has been registered as decontrolled. The majority of purchasers' solicitors are, no doubt, quite happy with a negative reply to this enquiry; a positive reply will probably come as a pleasant surprise! Except in very few cases, the enquiry can have very little practical significance in helping a purchaser to decide whether or not to go on with his purchase.

The next enquiry not previously mentioned is enquiry 11 as to matters in force under planning schemes operative before 1st July, 1948. These relate to preservation of trees and woodlands, control of advertisements and execution of street works and charges therefor. There were in any case few operative schemes and these matters are unlikely to arise often or to have any serious effect on existing house property.

Enquiry 15 relates to directions under art. 4 of the Town and Country Planning General Development Order, 1950, restricting "permitted development." Where a house exists such a direction can be of little significance; it might, for example, stop the owner from using a caravan in the garden as living accommodation, but is most unlikely to affect his decision to purchase or not.

Enquiry 16 relates to orders under s. 21 (revocation or modification of planning permission), s. 26 (discontinuance or demolition of existing development), s. 28 (tree preservation), or s. 29 (building preservation) of the Town and Country Planning Act, 1947. When confirmed, these orders are registrable as local land charges and the enquiry therefore relates only to the interim period between the initiating resolution of the authority and confirmation. Section 21 orders will not affect existing buildings; it is almost impossible to visualise the making of a s. 26 order for existing house property (action under the Housing Acts is much more likely); a tree preservation order may certainly affect residential property, though only as a rule of the larger type, and in any case cannot preserve a tree which has become a nuisance; building preservation orders are few and far between and hardly depreciate a property being bought for occupation. This enquiry is, perhaps, on the borderline of qualification for the short form, but is unlikely to affect any but a few cases and then not to any serious extent; the worst that might happen is that an ardent gardener would be dispirited by the shade of trees.

Enquiry 17 relates to payment of compensation under s. 20 of the Town and Country Planning Act, 1947. Such a payment is hardly likely to arise in the case of residential property and would not affect a purchaser's decision to purchase.

This is the last of the Pt. I enquiries on form Con. 29C not previously mentioned, but there is one enquiry (14) which appears in Pt. I of form Con. 29B (for county councils) and appears in Pt. II in form Con. 29C. This enquiry asks whether any order has been made under s. 87 of the National Parks and Access to the Countryside Act, 1949, declaring the area which includes the property concerned to be an area of outstanding natural beauty. Presumably, the enquiry is in Pt. II of the county borough form because an area in a county borough is unlikely to be subject to such a declaration. But those parts of counties to which most enquiries relate, namely, the towns, are equally unlikely to be affected by such a declaration. For example, the enquiry seems quite superfluous for a house in the centre of Swindon or Wembley or Bedford. In any case, the making of such an order has no direct effect on property; it is more likely to enhance than depreciate the value of residential property. It seems quite unnecessary, therefore, for this enquiry to appear in the suggested short form; indeed, it is doubtful whether it is necessary at all.

It is unnecessary in this article to examine the Pt. II questions because they are made optional as being unlikely to be of general importance.

Although the short form has been suggested primarily for the normal purchase of house property, it would provide a reasonable degree of protection for most types of property where a quick reply on the really important questions is required.

If such a form is acceptable to solicitors, it should be equally so to local authorities because of the saving in the time of staff responsible for providing the answers.

It would be interesting to know whether the assumptions underlying this article, namely, that the use of the new lengthened forms involves excessive expense and delay, are generally true and whether the use of a shortened form in normal cases would be acceptable to the senders both of the enquiries and the answers.

R. N. D. H.

Taxation

DISPOSITIONS: GIFTS OR SALES?

THE simplest way in which a man may minimise the amount of estate duty which will become payable on his death is by either spending his money or giving it away. Sometimes he wants to give some of it away and, as charity is said to begin at home, he often wants to give it to his own family. Unfortunately the Board of Inland Revenue are well aware of the tendency and over the years they have taken the appropriate steps. Of these steps the two which are most familiar are the provision of a time limit—now five years, except in the case of charitable gifts when it is one year—and the provision that that time limit will not commence to run so long as there is benefit reserved to the donor by contract or otherwise. Sometimes an attempt is made to draw the teeth of these provisions by arranging that assets, instead of being given away to the family, will be sold to them for one sort of consideration or another.

An obvious case in which such a transaction might be advantageous is where the prospective transferor owns shares in a controlled company which shares, on his death, will fall to be valued, not under the Finance Act, 1894, s. 7 (5), but under the Finance Act, 1940, s. 55. If such shares are sold for their full market value in cash then, true it is, the cash will pass on the death of the vendor except in so far as he has spent it or given it away, but full market value is usually very much less than "s. 55" value. At this stage one meets obstacles which are not so well known as the two already mentioned. First, one must take care that the proposed transaction is a sale and is within the provisions of the Finance Act, 1894, s. 3, where that section applies. Secondly, if as is frequently the case the proposed disposition is to a relative of the transferor one must negotiate the perils of the Finance Act, 1940, s. 44, as it has been amended by the Finance Act, 1950, s. 46. These matters are not so well known as the ordinary provisions about straightforward gifts *inter vivos*.

It is convenient to examine, first, the case of dispositions to non-relatives, although these may be the less frequent in practice; afterwards one may observe the special restrictions upon dispositions to relatives as they are defined in the Finance Act, 1940.

DISPOSITIONS TO NON-RELATIVES

For outright consideration

If, prior to the death, property is sold out and out for full consideration, then it is clear that that property does not pass on the death under the Finance Act, 1894, s. 1, although the purchase money, except in so far as it has been alienated, will pass. Further, if there has been such an out and out sale the property cannot be deemed to pass under the Finance Act, 1894, s. 2 (1) (*c*), as a gift *inter vivos*, for the short and simple reason that there has been no gift, at any rate as that word is ordinarily understood.

Difficulty arises where there is some doubt whether the consideration money was adequate. If the deceased sold a house, then worth £5,000, for a consideration of £4,000 it is often difficult to determine if this is a sale and purchase, albeit a bad bargain for the vendor, or whether it has in it the elements of a gift, at least so far as the £1,000 is concerned. One can only say that whether such a transaction is one of sale or gift can only be decided upon a consideration of all the surrounding circumstances. If the disposition appears to be a genuine business transaction it is no less a sale because the vendor made a bad bargain. But if the disposition appears to have been made with the intention of conferring a bounty then it is a gift notwithstanding that there was partial consideration.

At one time, from the decision of *A.-G. of Ireland* v. *Smyth* [1905] 2 Ir. R. 553 until that of *Re Fitzwilliam's Agreement* [1950] Ch. 448; 94 SOL. J. 49, it was thought that a disposition was *prima facie* a gift and was only taken out of the ambit of the Finance Act, 1894, s. 2 (1) (*c*), when the taxpayer could show either full consideration or partial consideration explained by a bad commercial bargain by the vendor. Now, however, it appears that the onus is on the Crown to show some element of bounty before the taxpayer can be called upon to justify the consideration which was paid.

Where it is held that the transaction is one of gift the question arises to what extent allowance can be had for the partial consideration. There is a school of thought (see C. N. Beattie, "Elements of Estate Duty," p. 41) that argues that any allowance must be purely concessionary since, because the transaction is one of gift, it cannot be a bona fide purchase within the Finance Act, 1894, s. 3, and so the provisions of s. 3 (2) as to partial consideration cannot apply. One rather wonders, however, if this is so in view of the decision of *Re Bateman* [1925] 2 K.B. 429, where Rowlatt, J., held that the object of s. 3 (2) was to see how much of the property passed by way of bounty and how much by purchase. If that be correct then the property passes because it is deemed to do so by s. 2 (1) (*c*) and allowance is given for so much of it as passes by way of purchase. Furthermore, if s. 3 (2) does not apply in a case of this sort it is left without much room to apply at all since it has no place where the transaction is a bad commercial bargain.

However that may be, it appears that an allowance is made in practice and that it is made upon the principle laid down in *Re Bateman*, *supra*, and not, as might have been thought, by deducting the value of the consideration from the value of the property as at the date of death. Thus, if the deceased transfers shares, then worth on the open market £5,000, for a consideration of £3,000 and if, on his death, the shares are valued at £3,500, estate duty is payable not on £3,500 less £3,000, viz., £500, but on the value of that

part of the shares which passed by bounty which is two-fifths of £3,500, that is, £1,400. This is of great importance if the shares fall to be valued under the Finance Act, 1940, s. 55, rather than under the Finance Act, 1894, s. 7 (5). In such a case the shares mentioned above might well be valued at £7,500 and duty would be payable not on £7,500 less £3,000, which is £4,500, but on two-fifths of £7,500, namely, £3,000.

For annuities, etc.

It is not always that the problem of distinguishing between a gift and a sale takes the simple form discussed above, where property either is deemed to pass as a gift or does not pass at all. Before considering the problem it is useful to look at the terms and application of the Finance Act, 1894, s. 3. It is there provided that duty is not payable if property passes on the death by reason only of a bona fide purchase for full consideration in money or money's worth paid to the vendor for his own use and benefit and, further, that if there was partial consideration so paid the value of the consideration shall be allowed as a deduction from the property for the purposes of estate duty. The principles upon which the deduction is allowed have been discussed above.

It is necessary that the purchase should be the only reason for the passing. So if *A* sells his house to *B* reserving thereout a life interest to himself, and *B* pays to *A* full consideration for the reversion which he has bought, there will be no duty payable when that reversion falls into possession on the death of *A*. See *A.-G.* v. *Dobree* [1900] 1 Q.B. 442, 450. Conversely, if *A* sells to *B*, for full consideration, an interest in the house limited to *B's* life no duty is payable on *B's* death when that interest ceases. It is otherwise if the property would have passed on the death whether or not the purchase had taken place. If a house stands limited to *A* for life remainder to *B*, and *A* disposes of his life interest, duty will be payable on *A's* death, because the property would have passed independently of the sale.

One may now examine some of the cases where there has been a disposition of property in consideration of an annuity of some sort or another payable to the disponer. The question is whether the disponer is a vendor for full or partial consideration or whether he is a donor who has reserved a benefit out of his gift so that its subject-matter will be deemed to pass on his death no matter for how long he may survive the transaction. There are three types of case which may be examined and they may be designated "A," "B" and "C."

Case "A" is where the actuarial value of the annuity which is to be paid, calculated at the time of the transaction, is equal to or greater than the then value of the property transferred or where, if there is a cash payment in addition to the annuity, the value of the two together is greater than that of the property transferred. In such a case the annuity payments will almost always be greater than the income from the property. Here the transaction is one of sale and purchase and in no sense a gift. On the death of the vendor no duty is payable on the property transferred and no duty will be paid on the cesser of the annuity as it will rest in personal covenant only.

Case "B" is where the annual payments to be made are substantially equal to or are less than the average yearly income which may be expected to be had from the property transferred. To take a simple example: *A* transfers to *B* £2,000 of 2½ per cent. Consols on the terms that *B* will pay him £50 per annum, or less, during *A's* life. This is not a sale at all, it is a gift of the Consols with a reservation thereout of a benefit to the donor. The benefit will closely resemble a life interest if the annual payment approximates to the income of the property and will resemble an annuity if it is less. In either case the property transferred will be deemed to pass as a gift *inter vivos* on the death of *A* and there will be no allowance for any partial consideration because this is not a bona fide sale at all. Nor will anything be allowed by concession. This case is to be distinguished from the case of a transfer for a partial outright consideration, because the payment of such an outright consideration can hardly be described as the reservation of a benefit.

An interesting variant of this case would arise if the terms of the bargain were not that *B* would pay the agreed annuity but that he would go to an assurance company and purchase for *A* an annuity of the specified amount. If *A* is then, as it were, presented with this outside contract it might be possible to say that it was a partial consideration in money's worth so that an allowance might be had under s. 3 (2); there does not seem to be any discussion of this point in the books.

Case "C" is midway between the other two. It is where, although the actuarial value of the annuity to be paid is less than the value of the property transferred, yet the annuity payments are greater than the income to be had from the property. This might well be the case where the disponer is of a very advanced age. In this case the transferee has to put his hand in his pocket each year and the excess of the annual payments reserved over the income derived from the property represents some partial consideration. The allowance is calculated on the *Re Bateman* principle and there passes on the death only that part of the whole which represents bounty rather than sale.

Dispositions to Relatives

Special provisions for the case of dispositions to relatives first appeared in the Finance Act, 1940, s. 44. They were to some extent modified in the Finance Act, 1944, and were largely remodelled by a particularly horrible example of drafting in the Finance Act, 1950, s. 46. In order to ensure that the Finance Acts should be no clearer than was absolutely necessary that section did not repeal and re-enact the old to apply to deaths after the specified day, but proceeded by enacting new subsections which were to be written into s. 44 of the 1940 Act; and the subsidiary provisions, such as an "associated operations" clause, were juggled about from one subsection to another. References here to subsections are to those inserted into the 1940 Act by the 1950 Act.

Definition of "relative"

A "relative" for this purpose is defined by the Finance Act, 1940, s. 44 (2), as:—

(*a*) The wife or husband of the deceased.

(*b*) The father, mother, children, uncles and aunts of the deceased.

(*c*) The issue of any such person as above and the other party to a marriage with any such person as above.

In all cases references to children include references to illegitimate or adopted children.

For outright consideration

Subsection (1) provides that any disposition to a relative shall be treated as a gift unless it was made for full consideration in money or money's worth paid to the deceased for his own use and benefit or unless the deceased was concerned only in a fiduciary capacity imposed on him other than by a disposition made by himself. Where there has been

partial consideration in money or money's worth paid as before, the value of the consideration will be allowed as a deduction.

The first thing to observe is that this provision restores, in the case of dispositions to relatives, the position as to onus of proof that existed before *Re Fitzwilliam's Agreement, supra*. That is to say, it is not upon the Crown to show an element of bounty but is on the taxpayer to show that full consideration was paid, so that every disposition is presumed to be guilty until it is proved innocent. It is necessary to show that the consideration was in money or money's worth paid to the deceased for his own use and benefit. These are the words of the Finance Act, 1894, s. 3, and in this present connection their effect must be examined closely.

It has already been said that one of the commonest reasons for trying to negotiate a sale to a relative is that the property in question consists of shares which, if they passed, would fall to be valued under the Finance Act, 1940, s. 55. Suppose *F*, the father, to hold 10,000 shares whose open market value is par and whose "s. 55" value is twice that figure. If, a week before his death, he sells to *S*, the son, who pays him £10,000 in cash, duty is payable upon cash £10,000 rather than on shares worth £10,000 but valued at £20,000. The difficulties arise when *S* has not got £10,000 and *F*, as an indulgent parent, is quite disposed to allow some or all of the purchase price to remain outstanding as a loan secured, maybe, by a mortgage or charge or evidenced, maybe, by a promissory note.

This, as Sydney Smith said of the Bishop of Sodor and Man, "won't do." It is idle to contend that *S* has paid £10,000 to *F* when in fact he has either given security for its future payment or else expressly and solemnly promised to pay it in the future. It is sufficient that the consideration be in money's worth, but if there is an exchange of property it would appear that the property representing the purchase price must actually be transferred at any rate to the extent that the transferor of that property must have done everything which it lay on him to do to divest himself. The provision as to partial consideration is in the same terms as the Finance Act, 1894, s. 3, and, no doubt, it will fall to be calculated on the principle of *Re Bateman, supra*.

The second "leg" of subs. (1)—para. (*b*)—is a great deal wider in its effects than might be supposed. Indeed, it is a veritable trap for the unwary; whether the Crown will choose to spring it on every possible occasion is doubtful, but, on the whole, it is preferable to keep one's head out of the lion's mouth than to rely on the animal's sporting instincts. Suppose, as is common, a man to settle property upon discretionary trusts for members of his family, or suppose, without going so far as this, he has settled property upon them in defined shares with a provision that the trustees may advance some or all of the capital of presumptive shares—indeed, such a power may be implied by the Trustee Act, 1925, s. 33. In the general way, when five years have elapsed, the settlor dismisses the settled property from his mind so far as estate duty is concerned. If, however, he is himself trustee of the settlement and he exercises his discretion in favour of a relative he is making a disposition to that relative in a fiduciary capacity which was imposed upon him by himself. Accordingly, the disposition has to be treated as a gift. Whether a settlor could be said to have made the disposition if he was one of two or more trustees is doubtful. The moral, however, to be safe, is that if a settlor wants to be a trustee of his own settlement it should be provided that any such discretionary powers or powers of advancement are to be exercised by the other trustees to the exclusion of the settlor.

Whilst in general consideration must be received by the deceased for his own use and benefit, this rule is to a certain degree relaxed by subs. (1B) if the consideration is paid to a "controlled company," as defined by the Finance Act, 1940, s. 58 (1). In such a case one must apply the "statutory hypothesis" of s. 56 (1) and (2) of the 1940 Act and imagine, even though one's imagination may boggle at it, that the assets of the company are held upon trust for its members and creditors other than trade creditors so that their rights as hypothetical *cestuis que trust* correspond with their actual rights under the articles of association. When that has been done one must see how much of the consideration money paid to the company would, on that hypothesis, enure for the benefit of the deceased and to this extent the consideration paid to the company can be regarded as paid for the purposes of subs. (1). Thus, to take an example much more simple than would be found in practice: the deceased holds 75 per cent. of the share capital in a company which has no creditors and only a single class of capital; if £1,000 is paid to the company by way of consideration £750 of that sum could be regarded as paid to the deceased.

Where the disposition in question was made not to a relative direct but to a "controlled company" and where any relative of the deceased was, at the time of the disposition or at any subsequent time during the deceased's lifetime, a member of that company or a member of another "controlled company" which is itself a member of that to which the disposition was made, the transaction is caught by subs. (4) as though the disposition were to a relative. But this is also affected by subs. (1B) discussed above. If, when the company is notionally regarded as a trust, it is found that the deceased himself is to some extent interested, the disposition will not have been all alienation, or to look at the matter another way, some of the property alienated will result back to the disponer as partial consideration. Thus, if *F*, the father, makes a disposition to a "controlled company" of which *S*, the son, is a member, but in which *F* himself has a 60 per cent. interest, one finds, on looking at the company as though it were a trust, that 60 per cent. of the disposition in fact results back to *F*, so that only 40 per cent. will be caught by subs. (1).

Finally, so far as dispositions by or through companies are concerned, one finds that, by subs. (1C), a disposition made to a relative of the deceased by a company of which the deceased had control at the time of the disposition is to be treated as a gift made by the deceased to the relative. This is also affected in its turn by the provisions of subs. (1B), as is the case with dispositions to controlled companies of which the relative is a member.

For annuities, etc.

Subsection (1A) provides that where there has been a disposition to a relative the creation in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person shall not, for our present purposes, be treated as consideration. The assignment to the deceased of an existing annuity is equally caught by this provision. An annuity is defined in wide terms by the Finance Act, 1940, s. 44 (3), and by s. 58 (6) an annuity which determines either on a death or on some other eventuality is "limited to cease on a death." On the other hand, an annuity which is limited for a period certain and which does not determine on a death is not affected and it falls to be treated on the same principles as have been discussed in connection with dispositions to non-relatives.

Subsections (1B), (1C) and (4) apply in the case of annuities created by or through or in favour of controlled companies and, *mutatis mutandis*, they operate in the same way as in the case of dispositions for outright consideration.

The effect of all this is that where property is transferred (either with or without the interposition of a "controlled company") in consideration of the payment to the deceased of an annuity the transaction is in all cases to be treated as a gift and not as a sale and this whether or not the value of the annuity is greater than the value of the property transferred. Furthermore, since the annuity is a benefit reserved "by contract or otherwise" the property transferred will be deemed to pass under the Finance Act, 1894, s. 2 (1) (*c*), on the death of the transferor at any period of time. In short, subject to the relief to be mentioned, every case of a disposition to a relative in return for an annuity limited to cease on a death is treated as in case "A" on p. 842, above, whatever may be the value of the annuity.

In some cases these provisions operate with more than usual hardship: such will be the case where, in the events which actually happen, the deceased has received by way of annuity payments more than the income which has been enjoyed from the property. In such a case the deceased has really received back some part of his capital which will, presumably, be reflected in his free estate. Some relief against this tendency to double tax is given in the Finance Act, 1944, s. 40.

Before looking at the manner in which such relief is computed, one may make two preliminary observations. Firstly, the relief afforded by s. 40 only applies to those cases which are brought into charge by the Finance Act, 1940, s. 44, as amended; if, as in case "A" on p. 842, above, estate duty would have been payable without s. 44, then there is no relief under the 1944 Act. Secondly, relief under s. 40 is limited to and will in no case exceed the relief which might have been had by way of partial consideration in a case not affected by s. 44—that is, in cases like case "C" on p. 842, above. If that were not so, it would sometimes pay, particularly where the deceased survived for a long time, to claim relief under s. 40 instead of on the ordinary principle of the Finance Act, 1894, s. 3 (2).

The principal difference between the relief under s. 3 (2) and under s. 40 is that, under the earlier and more general provision, relief is calculated, on the *Re Bateman* principle, on the footing of the situation at the time of the disposition. The actuarial value of the annuity is calculated and it matters not whether the deceased actually enjoyed it for fifty weeks or for fifty years. But under s. 40 of the 1944 Act relief is calculated in the light of the facts that actually occur. Briefly, the allowance is the difference between the payments actually made by the relative to the deceased and the income actually received from the property. If the income actually received is for some reason abnormally high or abnormally low there is substituted such rate of interest as is considered by the Commissioners to be reasonable. Interest is allowed on the payments at estate duty rate.

G. B. G.

A Conveyancer's Diary

TRUSTS FOR THE UPKEEP OF TOMBS

THERE is no essential connection between gifts to charitable institutions or upon charitable trusts on the one hand and directions for the upkeep of tombs on the other, but in practice the latter are so often engrafted on the former that the best expositions of what are called the tomb cases are to be found in the books on the law relating to charitable trusts. Moreover, a charitable organisation which is willing to accept a benefaction on a condition obliging it, either legally or morally, to maintain a tomb or family vault may sometimes acquire a useful addition to its funds without incurring any considerable responsibility, but before accepting a gift on terms of this kind will want to be advised of the nature and extent of its obligations. For all these reasons an article on the tomb cases, or rather, some of the more striking of the recent ones, will not be out of place in this issue of this journal.

Trusts for the upkeep of tombs are not *per se* illegal. A direction to an executor to erect a gravestone or memorial operates as a valid authority to charge the necessary expenditure to the testator's estate, subject only perhaps to the limitation that the execution of the direction will involve the estate in a reasonable expenditure only. This is well established by the authorities. On the same principle, if the testator goes on to direct his executor to maintain the structure, whatever it may be, which the executor has erected, such a direction is *prima facie* good, that is to say, it is good provided that it can be carried out without infringing any established rule of law. It is at this point that the rule against perpetuities has to be considered in relation to directions of this kind.

If the tomb or memorial or other structure which the testator desires to have maintained at the cost of his estate, or of a fund to be provided out of his estate, is within a church, no difficulties arise because such structure then forms part of the fabric of the church (a faculty would be necessary to remove or alter it), and trusts for the upkeep of the fabric of a church or any part of the fabric are charitable trusts, which are not generally affected by the rule against perpetuities. But if the structure is not in a church but, as is much more usual, in the graveyard outside it or in a cemetery wholly detached from a church, the upkeep of it is not a charitable purpose, and a direction for its upkeep, while not illegal, must be framed in such a way as not to infringe the rule against perpetuities if it is not to fail. This is perfectly possible, as will be seen from some of the cases to which I will refer; but before embarking on an examination of these cases I think it is as well to remind the reader that there are two branches to the rule against perpetuities, both of which can affect the validity of directions for the upkeep of tombs, and both of which are constantly, and sometimes without due distinction, referred to in the cases on this subject. The first and more familiar branch of this rule is that which prohibits the postponement of the vesting of interests in property beyond the permitted limit of a life or lives in being and a period of twenty-one years thereafter. The other, and in this connection more important, branch of the rule prohibits the limitation of property in such a way as to render it inalienable, either in perpetuity or for a period exceeding the permitted period.

The operation of both branches of the rule can be seen in the case of *Re Dalziel* [1943] Ch. 277, which also affords an excellent introduction to this subject generally. The testatrix, who died in 1938, by her will gave the sum of £20,000 to *B* Hospital, "to be added to and form part of the existing Dalziel Discretionary Fund," and this legacy was given on the express condition that the hospital should use the income to arise

therefrom for the upkeep of a certain mausoleum in a cemetery, and to rebuild the same when requisite; and the testatrix went on to provide that if the hospital should fail to carry out this request, she gave the said sum of £20,000 to such other of the charities named in her will as her trustees should select and as should be willing to accept the legacy subject to those conditions. Before her death the testatrix had transferred to the trustees of a discretionary fund held for the benefit of the hospital the sum of approximately £2,000, to be known as the Dalziel Discretionary Fund, on the terms that the cost of the upkeep of the mausoleum should be a first charge on that fund.

There were here two distinct gifts: (1) upon trust that the sum of £20,000 should be added to and form part of the Dalziel Discretionary Fund; and (2) the gift over to the other charity to be selected by the trustees. Cohen, J. (as he then was), held both these gifts to be void. As to (1), his decision was as follows: the evidence showed that the governors of the hospital were free to direct the application of the discretionary fund towards the maintenance of the mausoleum. *Re Tyler, infra*, made it clear that while there is no objection to a body formed for charitable purposes receiving and applying funds given to it absolutely in paying for the upkeep of a tomb, the upkeep is not a charitable object: it followed that the gift "to be added to and form part of the existing Dalziel Discretionary Fund" failed. As to (2), the question, in the learned judge's view, was concluded by the decision in *Chamberlayne* v. *Brockett* (1872), L.R. 8 Ch. 206. It was there held that if a gift in trust for charity is conditional upon a future and uncertain event, it is subject to the same rules as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*. On this principle, the gift over of the sum of £20,000 to a charity to be selected by the testatrix's trustees failed.

This part of the judgment of Cohen, J., in *Re Dalziel* is short, and the longer part of it is devoted to the subsidiary question which, it was argued, arose as a result of the failure of the direction to maintain the mausoleum, viz., whether the result of such failure was not to avoid the gift to the hospital *in toto*, but rather to free it from the condition to maintain the mausoleum, so that the hospital took the gift absolutely. This argument was rejected, and in the course of this part of his judgment Cohen, J., held that the direction as to the upkeep of the mausoleum was not simply a condition, but a trust. While this conclusion was expressed in so many words only in the part of the judgment which deals with the destination of the subject-matter of the gift on the footing that the direction to maintain the mausoleum was a mere condition, it is equally essential to the conclusions reached by the learned judge on the validity of (1) the original bequest to the hospital, and (2) the gift over. As to (1), on the authority relied on, *Re Tyler*, if the bequest had been in such terms as to permit the hospital to utilise capital for the upkeep of the mausoleum, it would have been unobjectionable; but the direction that the income only of the fund was to be so used implied a direction to retain the capital in perpetuity, and such a direction, unless the object is a charitable object, is void. As to (2), if the object of the original bequest had been charitable, the gift over would not have infringed the rule against perpetuities, since a gift over from one charity or charitable purpose to another is not subject to the rule (*Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460); but as this was not the case, the gift over failed. Here again, the fact that the original bequest was upon an invalid trust was vital. These two conclusions on the original bequest and the gift over illustrate, as I have suggested, the working of the two branches of the perpetuity rule. The original bequest infringed the branch of the rule which forbids the limitation of property in such a way as to render it inalienable; the gift over, the branch which forbids the indefinite postponement of the vesting of a gift in a beneficiary.

The failure of the testatrix's direction in *Re Dalziel* was due to the incorporation of that direction as a trust of the income of the fund which was the subject-matter of her bequest. But her object could have been achieved, and the hospital in that case would have benefited from the bequest, if this direction had been otherwise than as a trust. There are three methods, at least, by which provision can be made for the upkeep of a trust in perpetuity, as the law defines that expression.

The first is to take advantage of the decision in *Re Tyler* [1891] 3 Ch. 252. The testator in this case made his own will, and a somewhat ungrammatical and inartistic will at that, so that it was doubtless an accident that he should have stumbled on the effective method, or one of the effective methods, of framing a direction for the upkeep of his family vault; but as the books contain plenty of examples of testamentary directions of this kind which, despite every indication of preparation with professional assistance, failed of their purpose in this particular respect, the testator and his chosen charity were perhaps unusually lucky in the reliance which the testator placed in his own will-making powers. The bequest in question, as construed by the court, amounted to this: the testator gave to the trustees of the London Missionary Society a sum of £42,000 stock, subject to a certain life interest of limited amount, and he also committed to this Society the keys of his family vault in Highgate Cemetery, the same to be kept in good repair and the name legible, and to rebuild if required; and if the Society should fail to comply with this request, the bequest was to go over to Christ's Hospital.

This bequest was held to be good in all its terms by Stirling, J., and by the Court of Appeal. The *ratio decidendi* of the decision in both courts may be summarised thus. There is nothing illegal in a request to maintain a tomb, so long as compliance does not involve any infringement of the rule against perpetuities; there was no such possibility here, because there was no trust for the use of the income of the fund in a particular way, and indeed no such power for the legatee society; if the society took the bequest, it could comply with the testator's request by expending on the upkeep of his vault moneys which it obtained from other sources, and that involved no perpetuity; the condition was, therefore, not void on the ground of perpetuity, and although it might operate at an indefinite date in the future, as the gift over which would then take effect was a gift from one charity to another, i.e., a gift not subject to the principle of *Chamberlayne* v. *Brockett*, the gift over was good.

The essential features of a direction modelled on this decision must thus be, first, that the income of the fund is freely given to the charitable (or perhaps other) body concerned for the general purposes of that body; secondly, that the body concerned must be allowed to find its own funds for the upkeep of the testator's tomb; and thirdly, that the gift over on breach of the condition as to upkeep of the tomb must be in favour of a charity, and not in favour of any individual or any non-charitable organisation. No difficulty should arise in complying with any of these conditions. As to the first and second, if the testator objects that without the income of the particular fund the charity would, or might, not be able to carry out his desired purpose, it should be pointed out to him (as Stirling, J., observed in his judgment in *Re Tyler*)

that many charities "depend largely on the voluntary contributions of their supporters; and the funds required for keeping the family vault in repair may readily . . . be obtained from persons willing to subscribe for the purpose of retaining the administration of this large fund in the hands of the society, and without in the least touching on any fund devoted to charitable purposes." As to the last of these three conditions, a gift over, if one is made at all, must be in favour of another charity, but it is not strictly necessary to incorporate any gift over in such a direction at all, for if the original gift is subject to a condition with no gift over, the effect of a breach of the condition will be that the gift will revert to the testator's estate and be dealt with as part of his residue. Such a reverter is not subject to the rule against perpetuities (*Re Randell* (1888), 38 Ch. D. 213).

If no gift over is made, so that the sanction for a breach of the condition to maintain the tomb is the reversion of the gift to the testator's estate, then *semble* it is not necessary for the legatee to be a charity (see *Re Wightwick's Will Trusts* [1950] Ch. 260). But if legally unessential, the designation of a charity as legatee subject to the particular condition is often practically desirable, since charitable institutions are the longest lived of all organisations. A series of gifts to various charitable bodies, preferably corporate, each subject to a condition on the lines of that in *Re Tyler* and to a gift over, is the nearest thing that the law allows, and the ingenuity of the draftsman can devise, to a perpetually operative direction for the fulfilment of the desired object.

I have spent so long over the decision in *Re Tyler* because, in the first place, it is not immediately apparent how the testator's directions in that case succeeded when similar directions have so often failed, and some explanation of the essential features of that case is necessary in order to bring them out and, secondly, because a clause modelled on this decision seems to me to be the simplest and neatest method of obviating the rule that a trust for the upkeep of a tomb is subject to the rule against perpetuities. But this is not the only method. I have already suggested that there are at least two others. The first alternative is to adapt the direction for upkeep which was used, successfully, by the testator in *Re Chardon* [1928] Ch. 464. That decision was followed in *Re Chambers' Will Trusts* [1950] Ch. 267, a case of great interest which was examined in this Diary shortly after it had been reported (see 94 SOL. J. 513). There is nothing which I can usefully add to what I then said about these two decisions, except perhaps to remind readers that *Re Chardon* is a very controversial case, and it is possible that an appeal in a similar case in the future would result in its being, for all practical purposes, reversed. The decision in *Re Tyler*, besides being a decision of the Court of Appeal, has never, so far as I am aware, been criticised adversely.

Finally, a method which some testators are prepared to adopt, but others not (because of what is doubtless felt as a lack of precise obligation about the arrangement). It is always possible for a testator to make a bequest to a charitable organisation subject to a moral obligation on the part of the donee to use a portion of the income of the fund for the upkeep of the testator's tomb. It has sometimes been suggested that this is the only practicable method of providing for the upkeep of a tomb (see, e.g., *per* Joyce, J., in *Re Rogerson* [1901] 1 Ch. 715, at p. 719), but as has been seen, this is not so. However, if the matter is discussed with the donee before the will is executed, and the donee is willing to accept the bequest on the suggested terms, this may be regarded as a satisfactory method, and where the fund is small, is, perhaps, better fitted for its purpose than a gift subject to a strict condition, as in *Re Tyler*. Here again, it is not essential that the donee should be a charity, since the gift, whether of capital or income, will as a matter of law be an absolute gift and no question of infringing the perpetuity rule can therefore arise; but on the score of longevity a charity is to be recommended as a donee in preference to a non-charitable body. Whether in such a case the request to maintain the tomb is referred to in the will or not will be a matter of taste, but if it is, it is vital that the request should not constitute a trust.

"A B C"

Landlord and Tenant Notebook

LANDLORDS' LIABILITY TO PASSERS-BY

THE liability which I propose to discuss is liability for injury due to defects in premises, the defects having accrued since the letting, and I may start by recalling that in *Mint* v. *Good* [1951] 1 K.B. 517 (C.A.) Denning, L.J., indicated his view that this part of the law was ripe for some development. ". . . I venture to doubt in these days whether a landlord can exempt himself from liability to passers-by by taking a covenant from a tenant to repair the structure adjoining the highway."

Perhaps the first of "these days" was that on which *Wilchick* v. *Marks and Silverstone* [1934] 2 K.B. 56 was decided. It was held in that case that a passer-by, injured by a falling shutter (the fall being due to disrepair), was entitled to recover damages from both landlord and tenant, the landlord having reserved a right to repair. In fact, new law cannot be said to have been made by this authority, as it merely applied a principle stated tersely by Abbott, C.J., in *Laugher* v. *Pointer* (1826), 5 B. & C. 547: "I have the control and management of all that belongs to my land or house; and it is my fault if I do not so exercise my authority as to prevent injury to another," and which, indeed, could be based on one of Justinian's three root principles: *alterum non laedere*.

Since the *Wilchick* v. *Marks* decision, and before that in *Mint* v. *Good*, various illustrations and refinements and distinctions have been recorded in reports. In *Wringe* v. *Cohen* [1940] 1 K.B. 229 (C.A.) it was held that the knowledge or ignorance of the defect on the part of the landlord was immaterial if he were liable for repairs and the defect, being patent, was due to disrepair, but that if it were due to the act of a trespasser, or if the defect were a latent one, the plaintiff could not succeed unless he established knowledge; and this decision disapproved some observations made in the course of *Wilchick* v. *Marks* by Goddard, J., who had considered knowledge must be proved in every case. *Heap* v. *Ind, Coope & Allsopp, Ltd.* [1940] 2 K.B. 476 affirmed the rule that landlords who merely reserve a right to enter and do repairs are liable for injuries caused by (patent) defects, whether aware of the defects or not. And in *Howard* v. *Walker* [1947] K.B. 860 Goddard, L.C.J., held that when the injured third party was injured while actually on the premises as the tenant's invitee, the landlord was not, as in the case of injuries to passers-by, liable though the defect was one which it was his function to repair.

All these developments resulted from the introduction into the *Wilchick* v. *Marks* case of the passage from the

judgment of Abbott, C.J., in *Laugher* v. *Pointer* (1826), 5 B. & C. 547, and it is of interest to note how that passage was found to be applicable in spite of a number of differences in the facts and relative positions of those concerned. For *Laugher* v. *Pointer* was an action for damages for negligence, the negligence being that of a coachman driving a carriage owned by the defendant but drawn by horses hired from a livery-stable keeper who—to use a neutral expression—had supplied the coachman. The latter received no wages from either party but "looked to" the defendant for a gratuity. Abbott, C.J., nonsuited the plaintiff and was then a member of the court which, equally divided, discharged a rule to set aside the nonsuit. The learned chief justice, though impressed by the arguments accepted by two of his colleagues, still considered the claim misconceived; he conceded that a certain principle had been established, but not that it applied to the case before him; and the important thing is that that principle concerned realty and nuisance. For in *Bush* v. *Steinman* (1799), 1 Bos. & P. 404, it had been held that the owner of a house was liable for damage done to a chaise upset and damaged when it collided with a heap of lime in front of the house, the lime having been placed there in connection with repairs to the house, but the person who had placed it being very much a sub-contractor. Other cases concerned the results of mining operations, and Abbott, C.J.'s conclusion was: "Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management . . . [etc.]. But does it follow from this that I have the care, government, or direction of horses hired by me of another person, who send a servant of his own choice to conduct and manage them . . . ?"

Presumably the plaintiff in *Laugher* v. *Pointer* did not sue the livery stable keeper because he despaired, in the absence of any cash nexus, of establishing that the coachman was his servant or agent; and did not sue the coachman because the judgment would have remained unsatisfied. But, apart from the differences in the nature of the subject-matter, what *Wilchick* v. *Marks* decided was not that the landlord was liable to the exclusion of the tenant, but that both were liable.

Laugher v. *Pointer* was cited and discussed in a number of cases concerning vicarious liability for negligence before it was mentioned in *Wilchick* v. *Marks*, but those concerned in proceedings against reversioners appear to have overlooked Abbott, C.J.'s terse statement. It has, of course, the defects of the quality alluded to; what, one may ask, constitutes control and management and how much authority is conferred on those having such control and management?

One hard-fought case in which the passage might, possibly, have been cited to some advantage was *Bishop* v. *The Trustees of the Bedford Charity* (1859), 29 L.J.Q.B. 53. The defendants, trustees of land situated a little to the north of Lincoln's Inn and a little to the west of Gray's Inn, had let a house (near Bedford Row) for a term of thirty years, commencing in 1851, the tenant covenanting to do the repairs. The lease contained the usual provisos for re-entry on breach of covenant or non-payment of rent. The water supply for the house came from a tank in an area and cellar (the latter beneath the highway), covered with an iron grating. For some years the lessee occupied the first floor, letting the rest of the house to lodgers whose rights included the right to use the area for the purpose of drawing water from the tank; in March, 1856, he moved out of the house altogether and let the first floor to another lodger, with the same right. He failed to pay the Lady Day rent and, likewise, failed to pay that due at Midsummer and, in July, having become insolvent, he resorted to the Insolvent Court, "gave up" the lease to the official assignee and applied for his discharge. On or about 12th July the defendants notified the weekly lodgers that they were, in future, to pay rent to them instead of to the lessee. Two lodgers complied. At the same time the defendants opposed the application; unsuccessfully so, for the discharge was granted on 30th July. Less than a week later the plaintiff, an infant, while lawfully passing along Bedford Street, fell into the cellar by reason of the grating being out of repair and was badly injured. Three days later the local inspector of nuisance (now, by virtue of the Public Health (Officers) Act, 1921, s. 3 (1), sanitary inspector) served a statutory notice—dated, according to the report, 1st August (three days before the accident)—on the first-floor lodger, who was one of the two who had paid rent to the defendants, calling upon the recipient to repair the stone curb belonging to the area grating at the front of his house. The notice being addressed to the said lodger by name "or whom else it may concern," he wisely handed it to the defendants' agents and the work was at once done at their expense. Finally, in November, the assignee having repudiated the lease, the defendants obtained an order for its delivery up to them.

The tenant and the assignee were, as one would expect, not made parties to the proceedings; but I may mention here that when the case reached the Exchequer Chamber, it was held that the effect of the provisions of the Insolvent Act, 1837, was that a lease remained vested in a debtor until accepted by his assignee or given up to his landlord.

Before then, however, the plaintiff had obtained a verdict before Campbell, L.J., and the defendants a rule asking for it to be set aside on the grounds that the evidence did not show the defendants to be *occupiers* of the premises in which the plaintiff received injury and the fact of their being owners and landlords did not make them liable. The argument for the plaintiff was directed to establishing that there had been evidence that the defendants were, on 4th August, 1856, in the *possession and occupation* of the area and grating. The court was equally divided (the junior of the four judges then withdrawing in order that the plaintiff could appeal).

The argument for the plaintiff was (i) that the defendants had re-entered at the time, forfeiting the lease, and that (ii) in any event, by demanding rent from the lodgers, they had taken possession and estopped themselves from denying that possession. The grounds for rejecting these contentions were that (i) what they had done did not amount to a re-entry and (ii) that the notices to the lodgers did not require them to deliver up possession; nor did the compliance change the actual possession. This reasoning was accepted by the Court of Exchequer Chamber, a short judgment being delivered in the defendants' favour after a long interval; it had been hoped that the parties would settle the case amicably, but one knows that difficulties beset trustees who agree to such a course.

It was, indeed, a near thing for the charity concerned, and one may wonder whether, if the plaintiff's advisers had thought of the possibility of applying the *Laugher* v. *Pointer* principle to such facts, and based the claim on actual control rather than on possession and occupation, the balance might not have been tipped in her favour. The passage from Denning, L.J.'s judgment in *Mint* v. *Good* is, of course, not, and not meant to be, a statement of the law; but *Wilchick* v. *Marks* and *Heap* v. *Ind, Coope & Allsopp* (which goes near to deciding that a mere practice of effecting repairs for which the tenant is liable under the lease will make the landlord liable) would have caused the trustees' advisers a good deal of trouble.

R. B.

"A LITTLE CHARITY GOES A LONG WAY"

UNDER this headline an evening newspaper recently recorded one of those odd statistical facts which now and then, even to the least statistically minded of us, throw unexpected light and start unaccustomed trains of thought. H.M.S. *Charity*, a 1,700-ton destroyer, had sailed more miles during the Korean war than any other of Her Majesty's ships, covering in all no less than 126,000 miles, and using 29,000 tons of fuel. A ship small in size but great in achievement. Her task had been, clearly, to proceed—in the jargon of the sea—wherever and whenever her services were needed, to seek out trouble and meet it half way. Her functions were emphasised by contrast with her opposite number, the ship which had done the least steaming. This was, not unnaturally, the depot ship, which, in the words of the Press report, was "mostly at anchor, providing engineering and repair facilities."

So many reflections are prompted by this simple news item that it perhaps bears some affinity to the tales of Aesop or La Fontaine. For "depot ship" read "welfare state". For "*Charity*" read—but there is no need. Let *Charity* be herself, a pygmy beside her great sister ship, but a pygmy with the accomplishments of a giant. Her speed and efficiency must have saved many a situation; her flexibility and adaptability must surely often have been the only hope for comrades and allies in a tight corner. The depot ship, essential as she is and with all her resources and technical expertise, is powerless to meet imminent disaster in far-away places on the periphery of her operational area. She is indispensable—but no less so is *Charity*.

On her prodigious errands in Korean waters, covering a distance roughly five times the circumference of the earth, *Charity* consumed 29,000 tons of fuel. That is a staggering amount, but without it she would have been condemned to useless idleness; lives would have been lost; ships sunk; vital operations would have failed. With it she was enabled to perform glorious deeds which in their symbolism strangely echo the parallel symbolism of her name.

The Korean war is halted, but *Charity's* work is not yet done. She cannot be spared while there are lives to save or succour to bring in the stormy seas. She will still need fuel—a very great quantity of fuel. And the story of this gallant little ship seasonably reminds us all of this inescapable fact and of the part we have to play in seeing that the need is met. *Charity's* essential fuel is funds, funds to meet the never ceasing distresses of life, the crises of health or fortune, the bitter disasters of human relationships. We in our profession bear, as is often pointed out, a double responsibility in this: as individuals and as the advisers of others. In both capacities we are under an obligation that cannot be discharged haphazardly, but calls for informed judgment as well as the compassion which lifts us above the beasts of the field. And so, at this time as in previous years, it is right and proper that we should pause and take stock, renew our awareness both personal and professional of the manifold shipwrecks of life and the "little ships" whose dedicated task it is to come to the rescue.

It is not the purpose of these words to plead particular causes. That is done at once more eloquently and with more authority in the appeals, in this issue and in other issues throughout the year, of the many devoted organisations that exist for the relief of suffering and need. A list of them is to be found elsewhere in this issue, and even a glance at it will show the enormous field of voluntary action that remains necessary in this socially conscious age. Every one of them depends on voluntary support for the continuance of its work, and looks to us with confidence to play our part in ensuring that it does continue.

Those naval officers and ratings so unknowingly living a parable in the waters of the Far East had a price to pay for their high endeavour. According to the same news item, casualties in the Royal Navy and Royal Marines in the Korean conflict were: 26 officers killed, 2 missing, 8 wounded, 2 prisoners; 32 ratings and other ranks killed, 2 died of wounds, 10 died in captivity, 1 missing, 77 wounded and 22 prisoners. Heavy casualties were also incurred by the Army and the Royal Air Force. What of the aftermath? What of the blinded, the permanently disabled in mind or body? What of the wives and children of such men and of those who lost their lives? It is hypocrisy to comfort ourselves with the thought that there are organisations to care for these unless we recognise our necessary part in making their work possible. And so it is with distress in all its forms: a child abandoned is no less fatherless than the child of the serviceman killed in action; the loss of a breadwinner's health, or his sight or hearing, is no less a tragedy because it occurs in humdrum everyday circumstances and not in the heat of battle; research into diseases at present incurable and the provision of amenities for those who suffer cannot be shrugged off as of no concern to us. The aged, like the very young, are defenceless and mutely demand the care and understanding of those who minister to their simple needs; defenceless, too, are the dumb animals for whose protection so much effort is, alas, necessary. All these and many more are causes which have moved men and women to the practical action which is the only true compassion. And transcending and comprehending them all are the agencies of spiritual ministration, the very sources from which spring the great streams of Christian charity in its fullest and most significant sense.

These battles with suffering are battles which must be fought by the mobile forces of humanity—fast moving, manœuvrable, able to go into action at short notice, anywhere. H.M.S. *Charity*, their unconscious protagonist, perhaps did more than she and her company knew. But—somehow those 29,000 tons of fuel oil keep returning to the mind.

PROFESSIONAL SOCIETIES AS CHARITIES

DOCTORS, surgeons, engineers, solicitors, and other professional men are organised in societies, institutions, or colleges, and it is obviously for the benefit of the community that such bodies should seek to maintain a high standard of professional conduct among their members. Would it, therefore, be ridiculous to suggest that, for example, The Law Society was in the technical legal sense a charity? Indeed, many such bodies have actually contended that they are charities, or educational bodies; but whereas many cases have been called, few of the contestants have been chosen. One of them which has recently finally triumphed is the Royal College of Surgeons of England. It is rather a long story, but it will bear the telling.

The historical background is provided by the case of *Beaumont* v. *Oliveira*, L.R. 4 Ch. 309, which came before the Court of Appeal in 1869. The question there was whether the Royal Geographical Society and the Royal Society were charities for the purposes of the Charitable

Uses Act, 1736. Sir C. J. Selwyn, L.J., is reported as saying (rather jerkily) :—

> "In the case now before us, both the bequests are bequests to corporations, the purposes of which are the diffusion and improvement of particular branches of knowledge. They subsist for these purposes and no others, therefore for public purposes—therefore for the advancement of objects of general public utility—therefore for purposes analogous and similar to those mentioned in the Statute of Elizabeth—therefore for charitable purposes . . ."

That was clear enough, but difficulties were encountered when societies which, while serving the cause of the growth of knowledge, also served some more selfish aims, put forward their claims.

The ball was set rolling in 1886 by the *Society of Writers to the Signet*, 14 R. (Ct. of Sess.) 34 ; 2 Tax Cas. 257, who claimed exemption from corporation duty on the ground that the society promoted, if not exclusively yet in the main, education or science. The Court of Session unhesitatingly rejected this claim. The Lord President was not to be persuaded that people became members of the society for the purpose of studying literature, or the fine arts, or science, or for the purpose of being educated. As he saw it, they became Writers to the Signet for the purpose of making pecuniary gain by a profession. He thought it quite impossible to say that the income of the society's property was applied to anything other than the purpose of giving facilities to the members of the society to exercise their profession.

Later on, in *Forrest's* case, *infra*, Lord Watson pointed out that the position of the society was strictly analogous to that occupied in England by the Inns of Court, and in Scotland by the Faculty of Advocates. It was simply one of several portals through one or other of which an individual may pass before he can practise as an agent before the Court of Session Persons who preferred to enter their profession by that portal joined the society, but their object in doing so was to acquire the status and privileges of the duly qualified legal practitioner. These qualifications were tested before admission, but once they had become members they did nothing towards advancing the science of law, unless it were by actually pursuing their profession in their individual capacity.

The Scottish lawyers returned to the charge in *Farmer* v. *Juridical Society of Edinburgh* [1914] S.C. 731 ; 6 Tax Cas. 467, when they claimed exemption from income tax, Sched. A, as being a literary and scientific institution. The society did undoubtedly advance the science of law and the pursuit of general literature, but as membership of the society was denied to all except lawyers, the court decided that it was in the main a professional society, and the claim failed.

The running fight for recognition as a charity by the Institution of Civil Engineers began in 1879 when they got off to a bad start in *R.* v. *Institution of Civil Engineers*, 5 Q.B.D. 48. It was held by a Divisional Court that the institution was not a society established for the purpose of science exclusively within the meaning of the Scientific Societies Act, 1843, and so was not exempt from parochial rates.

In 1887 the institution met defeat before the Divisional Court again (19 Q.B.D. 610) in their claim for exemption from corporation duty on the ground that they existed for the promotion of science or education. But persistence brought its due reward and the Court of Appeal (20 Q.B.D. 621), and the House of Lords in *Forrest's* case (1890), 15 App. Cas. 334 ; 3 Tax Cas. 117, on each occasion by a majority, found in favour of the institution. Although the institution prevailed in this litigation, the margin of success was a fine one : counting judicial heads for and against, the score was four all. Nevertheless, the institution had the gratification of hearing it said that they did something higher and larger than the mere education of students and others for the profession of civil engineer.

Having gained these laurels, it is understandable that the institution felt aggrieved when the Commissioners of Inland Revenue thereafter refused them exemption from income tax which they claimed as being a charity. The Special Commissioners and Rowlatt, J., were against them, but undaunted they pressed on to the Court of Appeal.

That court, duly impressed by the favourable view of the institution's objects taken in *Forrest's* case by the House of Lords, duly bestowed on them the sought-after accolade of charitable status ([1932] 1 K.B. 149 ; 16 Tax Cas. 158).

Romer, L.J., usefully said that where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer upon the holder personal advantages of considerable value to him in his profession or in his social standing. But in such cases, although the securing of such advantages to the members may, in a sense, be regarded as one of the objects of the society, such object is merely concomitant or incidental to the real object of the society, and if that real object be charitable, the society is established for charitable purposes only.

The saga of the medicine men remains to be told. The first of them to enter the lists was the *Royal College of Surgeons, Edinburgh*, in 1892 (29 S.L.R. 173 ; 4 Tax Cas. 173), when the college claimed exemption from income tax, Sched. A, as a scientific institution. The Court of Session, however, while freely accepting that the college promoted science, found that its primary and proximate objects were professional.

The Royal College of Surgeons of England then took up the running. The college had been incorporated by Royal Charter in 1800 with the object of promoting the study and practice of the art and science of surgery, and in 1898 they claimed exemption from corporation duty on the ground that they existed for the promotion of science or education.

The Divisional Court refused their claim, and in the Court of Appeal ([1899] 1 Q.B. 871 ; 4 Tax Cas. 344) Sir Edward Clark argued that the main object of the college was the promotion of science notwithstanding that some of the purposes of the society furthered the interests of the members of the profession, as these were merely ancillary. But the Court of Appeal were against him. They took the view that the college had two main objects of equal importance : one being the promotion of the science of surgery and the other the promotion of the practice of surgery as a profession, including the interests of practitioners of that profession. Hence the objects of the college were not exclusively the promotion of science and they were accordingly not exempt from corporation duty.

Ireland's turn came in 1918 when *Miley's* case, 1 Ir. R. 455, was staged in Dublin. A legacy had been bequeathed to the Royal College of Surgeons, Ireland, and it fell to be decided whether this was a charitable bequest. The Irish Court of Appeal held that as the college were incorporated with two main objects, the promotion of the science of surgery and the promotion of the interests of surgeons, the latter not being a charitable purpose, the college were not a charity. The Chancellor said, in plain terms, that although the college did operate for the benefit of the public, it would be ridiculous to suggest that in their professional aspect they were discharging a charitable or other than a selfish purpose. He emphasised how necessary it was to keep distinct the charitable from the non-charitable functions of the corporation, as otherwise the Incorporated Law Society and the

Society of the King's Inns might well be considered charitable institutions.

Ronan, L.J., agreed that it was in the interests of the public that there should be an ample supply of well-educated and competent surgeons, but so it was that there should be intelligent and honest lawyers, engineers, railway officials, mercantile marine officers—and plumbers. But a specific gift to a plumbers' welfare society would not be charitable.

The venue then shifted back to London, when in 1927 the General Medical Council entered the arena with a claim for exemption from income tax as a charity, only to meet defeat before Rowlatt, J., and a unanimous Court of Appeal (97 L.J.K.B. 578; 13 Tax Cas. 819).

It was clear, it seemed, that the council were pre-eminently engaged in regulating the conduct of the members of the medical profession with a view to protecting the profession itself. The objects and functions of such a body, it was said, were far remote from anything which comes within the spirit or intention of the Statute of Elizabeth I.

But a change was to come over the scene. In 1950 the Royal College of Surgeons of England, who had for fifty years been quietly biding their time, went into action again.

The opportunity occurred like this. In 1914 there had been established in connection with the Middlesex Hospital at the instance of Sir John Bland-Sutton the Institute of Pathology which bears his name. In 1943 Lady Edith Goff Bland-Sutton died and directed by her will that the income of her residuary estate should be applied for the benefit of the Bland-Sutton Institute of Pathology, but that should the Middlesex Hospital become nationalised or pass into public ownership there should be a gift over to the Royal College of Surgeons of England absolutely.

With the advent of the National Health Service and its impact on the Middlesex Hospital, it became necessary to decide whether the events which Lady Bland-Sutton had contemplated might happen had come to pass or not. The House of Lords, affirming the Court of Appeal, held that the Middlesex Hospital had indeed been nationalised, with the result that the gift over had taken effect in favour of the college, unless that gift over was rendered invalid by the rule against perpetuities. Accordingly, the gift would be good if the college were a charity in the legal sense of the word. Whether the college were a charity or not turned out to be a question (perhaps not altogether unexpectedly) upon which opinions differed, and it is that question alone which is of interest for present purposes.

The college won the first round before Danckwerts, J. (*Re Bland-Sutton, deceased* [1951] 1 Ch. 70). His lordship fully accepted that a society formed "for professional purposes" was not a charity; this might apply, he thought, to the four Inns of Court or The Law Society, although apparently the ancient Inns of Chancery were purely places of learning, and therefore charities, as was held in regard to Clifford's Inn in *Smith* v. *Kerr* [1902] 1 Ch. 774. He was impressed by the argument of Sir Andrew Clark that the art and science of surgery are essentially practical and cannot be promoted without the actual practice and experience of practising surgeons. It followed, said Sir Andrew Clark, that the Royal College of Surgeons was in a similar position to the Institute of Civil Engineers, which existed for the promotion of those branches of mechanical science lying within the province of civil engineering. Moreover, this very practical purpose had been held by the Court of Appeal to be charitable.

Danckwerts, J., decided to follow that decision rather than the adverse decision of the Court of Appeal in 1899 in regard to the Royal College of Surgeons themselves, which had been given, after all, in a different context. He therefore held the college to be a charity.

But the Court of Appeal ([1951] Ch. 485), while sympathising with Danckwert, J.'s opinion of the nature and purposes of the college, felt itself constrained—in conformity with the principles expounded in *Young* v. *Bristol Aeroplane Co.* [1944] K.B. 718—to follow its own previous decision that the college had not one primary purpose but dual purposes; which was fatal to the claim of the college to be a charity. The Master of the Rolls, Sir Raymond Evershed, incidentally noticed that half a century had elapsed since the previous decision of the Court of Appeal had been given, during which period the college had, he gathered, been consistently treated as a non-charitable organisation.

But what is half a century in the life of a corporate body which has its roots in the mediæval City craft-guilds of the barber-surgeons? So, on to the House of Lords: *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* [1952] A.C. 631, where the college achieved final victory by a 4 to 1 majority.

Lord Morton of Henryton took a quite different view of the construction of the charters of the college from that of the Court of Appeal in 1899. He thought that the promotion of the interests of practising surgeons as a profession was an incidental although an important and, perhaps, a necessary consequence of the work of the college in carrying out its main object of promoting and encouraging the science of surgery itself.

Lord Normand examined the byelaws of the college which, it had been argued, showed its professional character, and he found them so much in line with those of the Institution of Civil Engineers that he felt it would be impossible to treat the college any differently from that institution.

Lord Reid was able to construe "promoting the practice of the art of surgery" as meaning promoting the practical side of surgery and not as promoting the interests of those practising surgery. Lord Tucker concurred.

The sole dissentient voice was that of Lord Cohen, who was unable to regard the disciplinary and "professional defence" activities of the college as purely ancillary to their plainly charitable objects; he alone of the law lords was still opposed to the contention advanced by Sir Edward Clark fifty years before.

So it was that the Royal College of Surgeons of England joined that select band of charitable bodies which consists of the Royal Society and other learned societies. It would seem, it may perhaps be suggested, that for an organisation of predominantly professional men to be in law a charity, it must exist primarily for the promotion and advancement of that branch of knowledge of which it is so special a repository.

S. O.

Mr. RAYMOND LAURENCE MORETON, solicitor, of Bedford Row, London, W.C.1, is the new Master of the Haberdashers' Company for the coming year.

The Lord Chancellor has appointed Mr. JOHN LESLIE WILLIAMS, M.B.E., to be the Registrar of Blackwood, Tredegar and Abertillery and Bargoed County Courts and District Registrar in the District Registry of the High Court of Justice in Blackwood as from 1st December, 1953.

The Queen has been pleased to appoint Mr. EDWARD ANTHONY HAWKE, Chairman of the Court of Quarter Sessions for the County of London, to be Common Serjeant in the City of London, in succession to His Honour Sir Hugh Beazley, who is to retire on 31st December.

Mr. GEORGE H. E. JONES, deputy town clerk since 1948, has been appointed town clerk of Derby in succession to Mr. E. H. Nichols.

SIR WINSTON CHURCHILL'S MESSAGE

"I am very glad to commend to you the British Limbless Ex-Servicemen's Association and I wish its appeal every success. I ask you all and I want you to ask your friends to support it generously and thus repay, at any rate, a little of the debt we owe to those who have lost limbs on active service in our country's defence in the two World Wars."

Winston S. Churchill

40,000 BRITISH LIMBLESS EX-SERVICEMEN need your help . . .

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(Registered in accordance with the National Assistance Act, 1948)

PETER E— lost his sight as a result of an explosion at the age of eleven. But he has a seeing *mind*—trained at Worcester College, the well-known school for talented blind boys administered by the R.N.I.B. With the aid of Braille he has overcome his handicaps and taken the General Certificate of Education. Peter's next objective is to enter a University and read Law.

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Education is among the many services for which N.I.B.—still a *voluntary* body—seeks support through the kindly recommendations of Legal Advisers to their clients. Full details of N.I.B.'s finances will gladly be sent on request. Shown below is a recommended form of bequest.

I give.....to the ROYAL NATIONAL INSTITUTE FOR THE BLIND, of 224, 226 & 228 Great Portland Street, London, W.1, for the general purposes of the Institute, and I declare that the receipt of the Hon. Treasurer for the time being of such Institute shall be a good discharge to my Executors.

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Telephone: PARK 6822

Animal Health Trust, Abbey House, Victoria Street, London, S.W.1. Undertakes research work on behalf of all sections of livestock. Assists men and women desirous of entering veterinary profession.

Army Benevolent Fund, 20 Grosvenor Place, London, S.W.1. Instituted to secure more efficient aid and support for military charities. Nearly £2,500,000 has already been allocated in grants to these funds.

Bow Mission, 3 Merchant Street, London, E.3. Maintains a Home of Rest for sick, convalescent and needy old folk. Work includes provision of Christmas cheer, country holidays for children and old folk.

British and Foreign Bible Society, 146 Queen Victoria Street, London, E.C.4. Exists for the wider circulation of the Holy Scriptures without note or comment. In this enterprise it unites Christians of almost every communion.

British Deaf and Dumb Association, 21 Queen Street, Paisley. Maintains a home for the aged and infirm deaf and dumb, and provides financial assistance for those in need.

British Empire Society for the Blind, 53 Victoria Street, London, S.W.1. To promote the welfare, education and employment of the blind.

British Home for Incurables, Streatham, S.W.16. Provides the benefits of home life to 100 incurable invalids and also life pensions for 200 others able to be with friends or relatives.

British Legion, Pall Mall, London, S.W.1. Finances the British Legion's welfare, benevolent and rehabilitation work among ex-Service men and women of ALL ranks, ALL Services, ALL wars, and their dependents.

British Limbless Ex-Service Men's Association, 31 Pembroke Road, London, W.8. Provides assistance to all limbless ex-Service men in all matters connected with welfare and employment.

British Red Cross Society, 14 Grosvenor Crescent, London, S.W.1. Takes no account of race, creed or political consideration ; it is a power for good in a troubled world.

British Sailors' Society, 680 Commercial Road, London, E.14. Maintains Residential Clubs and Canteens in ports around coasts of United Kingdom and Eire, and overseas. Assistance for sailors and families.

British Union for the Abolition of Vivisection, Inc., 47 Whitehall, S.W.1. To obtain the prohibition of all experiments upon living animals now being performed under the Cruelty to Animals Act, 1876.

Caxton Convalescent Home, 1 Gough Square, London, E.C.4. For men and women over 15. The only Convalescent Home for the Printing and Kindred Trades situated at Limpsfield, Surrey.

Central Council for the Cure of Cripples, 34 Eccleston Square, London, S.W.1. A national voluntary organisation founded to protect the interests of all who are crippled.

Church Army, 55 Bryanston Street, London, W.1. Carries on a great programme of evangelistic and social work which meets almost every phase of human need from babyhood to old age.

Church Missionary Society, 6 Salisbury Square, London, E.C.4. Carries the Gospel to the non-Christian world. Helps to spread Christian education in Africa and the East. Is the largest medical missionary venture.

Church Moral Aid Association, 20 John Street, Theobald's Road, London, W.C.1. This Association assists committees to found Rescue Homes and acts as Custodian Trustee for properties.

Church of England Children's Society, Old Town Hall, Kennington Road, London, S.E.11. Rescues and cares for children in need or those who are cruelly treated or in moral danger. No destitute child refused.

Clapton Methodist Mission, 17 Knightland Road, London, E.5. Provides holiday accommodation for old-age pensioners, convalescents and children from East London.

Distressed Gentlefolk's Aid Association, 10 Knaresborough Place, London, S.W.5. For the relief of British gentlepeople in distress. Makes weekly grants to over 300 pensioners, mostly aged and infirm.

Dr. Barnardo's Homes, Barnardo House, Stepney Causeway, London, E.1. Supports 7,000 boys and girls. Over 141,000 children rescued in 86 years. No destitute child ever refused admission.

Dr. George Richards Charity, 33 Bedford Square, London, W.C.1. Grants made to clergymen of the Church of England who are deserving of assistance and, through illness and infirmity, have become incapable of performing their clerical duties.

East End Mission, 583 Commercial Road, London, E.1. Ministers to the last, the least and the lost, irrespective of creed. Maintains eight centres in East London, including a Social Department and Settlement for Christian Workers.

Empire Rheumatism Council, Tavistock House (N), Tavistock Square, London, W.C.1. To organise research into the causes and means of treatment of rheumatism, arthritis, fibrositis and allied diseases.

Ex-Services Welfare Society, Temple Chambers, Temple Avenue, London, E.C.4. The *only* voluntary *specialist* organisation supplementing the work of the State, exclusively for men and women of H.M. Forces.

Fairbridge Society, 38 Holland Villas Road, London, W.14. To promote the settlement within the Commonwealth of deprived children resident in the U.K., and to establish schools for the education of these children.

Florence Nightingale Hospital, 19 Lisson Grove, London, N.W.1. Provides medical and surgical treatment for ladies of limited means and those of the professional classes.

Friend of the Clergy Corporation, 15 Henrietta Street, London, W.C.2. Provides permanent pensions for elderly widows and orphan maiden daughters of the clergy in straitened circumstances.

Friends of the Poor and Gentlefolk's Help, 42 Ebury Street, London, S.W.1. Assistance given to all classes in distress. Gentlefolk's Help provides Homes for elderly gentlepeople and gives pensions.

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Gentlewomen's Work and Help Society (Inc.), 1 Ridgefield, King Street, Manchester, 2. Helps gentlewomen of all ages resident in all parts of the British Isles.

Greater London Fund for the Blind, 2 Wyndham Place, London, W.1. The central organisation in London raising money for societies and associations engaging in services to the civilian blind.

Guild of Aid for Gentlepeople, 86A Eccleston Square, London, S.W.1. Gives help by regular allowances, and in emergencies, to men and women of gentle birth, too old or too infirm to support themselves.

Home of Rest for Horses, Westcroft Stables, Boreham Wood, Herts. To enable the poorer classes to procure rest and skilled treatment for their ponies and donkeys when such care is needed.

Homes of St. Barnabas, Dormans, Surrey. These homes are maintained by what fees the residents can afford, interest on invested capital from legacies, etc., and general subscriptions.

Hostel of God, 29 North Side, London, S.W.4. To provide a home where men and women in the last stage of illness, without home or friends to help them, may end their days in peace, carefully nursed.

Imperial Cancer Research Fund, Royal College of Surgeons of England, Lincoln's Inn Fields, London, W.C.2. A centre for research and information on cancer, and carries on continuous and systematic investigations.

Invalid Children's Aid Association, 4 Palace Gate, London, W.8. Helps thousands of sick children to health and happiness through 14 London Branches and seven Residential Homes.

John Groom's Crippleage, 37 Sekforde Street, London, E.C.1. Trains and employs crippled women and girls in high-class artificial flower making. Accommodation provided in homely hostels.

King Edward's Hospital Fund, 10 Old Jewry, London, E.C.2. Not directly affected by the National Health Service Act. It can assist new developments of great promise not included in Health Service.

King George's Fund for Sailors, 1 Chesham Street, London, S.W.1. The Central Fund for the Marine Benevolent Societies, which assist all seafarers, past and present, of the Royal Navy and Merchant Navy.

Law Association, 25 Queensmere Road, London, S.W.19. Financial relief for necessitous members and their families and dependent relatives of deceased members, and necessitous solicitors not members.

London Association for the Blind, 88/90 Peckham Road, S.E.15. Training and employment in workshops ; homes and hostels ; self-contained flats for men and women. Benevolent and Pensions Fund and Blind Welfare generally.

London City Mission, 6 Eccleston Street, London, S.W.1. Maintains 200 missionaries in door-to-door visitations, etc. Mission Halls in many parts of London. Has holiday home for its own workers.

London Police Court Mission, 2 Hobart Place, London, S.W.1. Provides a home and a hostel for boys on probation, a similar hostel for girls on probation and a home for children who have been ill-treated or criminally assaulted.

Ludhiana British Fellowship, 12 Queen Anne's Gate, London, S.W.1. Graduates serve throughout India and Pakistan. Some 300 students now training as doctors, nurses, dispensers, etc.

Methodist Homes for the Aged, 1 Central Buildings, London, S.W.1. Maintains 11 large Methodist Homes which are homes in the warmest and fullest sense of the word.

Methodist Missionary Society, 25 Marylebone Road, N.W.1. For the work of world Evangelism through preaching, teaching and healing.

Miss Sheppard's Annuitants' Homes, 12 Lansdowne Walk, London, W.11. To give a real home to gentlewomen in good health, aged 60 to 75 on entry, with small assured incomes.

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Mission to Lepers, 7 Bloomsbury Square, London, W.C.1. Has 117 centres for sufferers from leprosy and healthy children of leper parents. Provides Christian teaching at several public leprosy centres.

Mission to Seamen, 4 Buckingham Palace Gardens, London, S.W.1. Maintains 85 stations at home and overseas with port staff. Institutes and launches. All seamen welcomed.

Moravian Missions, 14 New Bridge Street, London, E.C.4. Oldest to heathen, first to Jews, first to send out medical missionaries, first to lepers.

Mothers' Clinics, 106 Whitfield Street, London, W.1. Founded to give gratis to poor married women information in the control of conception by medical women and nurse-midwives.

National Association of Discharged Prisoners' Aid Societies (Inc.), 66 Eccleston Square, London, S.W.1. Promotes co-operation amongst certified D.P.A. Societies. Administers private gifts for special cases.

National Association for the Prevention of Tuberculosis, Tavistock House North, Tavistock Square, London, W.C.1. A voluntary body seeking to prevent and control tuberculosis by research, education and propaganda.

National Canine Defence League, 8 Clifford Street, London, W.1. Maintains animal clinics with full hospital service. Provides homes for unwanted dogs.

National Children's Home, Highbury Park, London, N.5. Helps children deprived of a normal home life. Forty branches. Over 3,000 girls and boys cared for and nearly 36,000 benefited.

National Council for Animal Welfare, 126 Royal College Street, London, N.W.1. Aims at the recognition of relationship of all living things.

National Fund for Poliomyelitis Research, Vincent House, Vincent Square, London, S.W.1. For the promotion of research into the causes, cure, prevention and treatment of poliomyelitis.

National Institute for the Blind, 224 Gt. Portland Street, London, W.1. A voluntary organisation serving 81,000 blind of England and Wales, and the blind in many parts of the British Empire.

National Institute for the Deaf, 105 Gower Street, London, W.C.1. To promote and encourage the prevention and mitigation of deafness and the better treatment, education, training and welfare of the deaf.

National Library for the Blind, 35 Gt. Smith Street, London, S.W.1. The library possesses 289,985 volumes in embossed type and is free to blind readers. 1,500 volumes issued daily by post.

National Playing Fields Association, 71 Eccleston Square, London, S.W.1. To secure adequate playing fields and playgrounds, either directly or in co-operation with local authorities and associations.

National Society for Cancer Relief, 47 Victoria Street, London, S.W.1. Assists poor persons suffering from cancer and those needing nursing or other special facilities. Provides blankets, clothing, fuel for patients.

National Society for the Prevention of Cruelty to Children, Victory House, Leicester Square, London, W.C.2. Saves children from mental and physical ill-treatment and neglect.

People's Dispensary for Sick Animals, P.D.S.A. House, Clifford Street, London, W.1. Established to provide free treatment for sick and injured animals of the poor.

Poor Clergy Relief Corporation, 27 Medway Street, London, S.W.1. Makes grants to the clergy of the Church of England at home and abroad, also Wales, Scotland and Ireland, their widows and orphan daughters.

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Royal Air Force Benevolent Fund, 1 Sloane Street, London, S.W.1. Exists primarily to help those disabled while flying and the dependants of those killed.

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Searchlight Cripples Workshops, Mount Pleasant, Newhaven, Sussex. A home and workshop for young men too badly crippled for acceptance by Ministry of Labour training establishments for the physically handicapped.

Shaftesbury Homes and Arethusa Training Ship, 164 Shaftesbury Avenue, London, W.C.2. A home and industrial training for homeless and fatherless children.

Shaftesbury Society, John Kirk House, 32 John Street, London, W.C.1. Renders Christian social services to poor and crippled children and their parents in the neediest areas of London.

Shipwrecked Fishermen and Mariners' Royal Benevolent Society, 16 Wilfred Street, London, S.W.1. Their object is to feed, clothe, assist and send home and replace the losses of shipwrecked fishermen.

Soldiers', Sailors' and Airmen's Families Association, 23 Queen Anne's Gate, London, S.W.1. A nation-wide voluntary organisation to give advice to the families of service and ex-service men and women.

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St. Dunstan's, 191 Marylebone Road, London, N.W.1. Is responsible for the re-education and training, settlement in homes and occupations and the lifelong welfare of blinded service men and women.

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CRUELTY TO ANIMALS

IN this article it is proposed to review some of the provisions of the law relating to cruelty to animals. The subject is a wide one and covers very many statutes, not only those directed against deliberate cruelty but also those, for example, relating to the control of vivisection, pet shops, performing animals, humane slaughtering, rabbit-traps, cockfighting, transport of animals, films depicting cruelty, anæsthetics for operations, docking and nicking of horses, knackers, protection of birds, riding establishments and export of horses. The Slaughter of Animals (Pigs) Act, 1953, relating to the humane slaughtering of pigs, will come into operation on 1st July, 1954, and among the Private Members' Bills going forward in this session of Parliament are several dealing with the protection of animals. There is also the Protection of Birds Bill, now before Parliament, which will repeal and replace more than twenty-five Acts on that subject. This Bill is discussed in a leading article in *The Times* of 11th November, 1953, where its purpose and effect are summarised. Solicitors who have clients concerned with the taking or killing of hoopoes, golden orioles, phalaropes, ruffs and reeves, chiffchaffs, goosanders, rose-coloured pastors, tree-creepers and other wild birds, should remember that, in addition to the statutes, there are also orders in force in many areas relating to wild birds.

On the general principle that "prevention is better than cure," the subject of preventing cruelty or further cruelty by the method of rendering the offender unable to commit it will first be discussed. By the Protection of Animals Act, 1911, s. 3, a court, on conviction of the owner of an animal for cruelty, may, in addition to any other punishment, deprive him of ownership of the animal and make any necessary order as to its disposal, but the court, before depriving him, must have been shown, by evidence as to a previous conviction or as to the character of the owner or otherwise, that the animal, if left with him, is likely to be exposed to further cruelty. Further, by the Protection of Animals (Cruelty to Dogs) Act, 1933, s. 1, any court before which a person is convicted under the Protection of Animals Act, 1911, of cruelty to a dog, may order him to be disqualified for keeping a dog and holding or obtaining a dog licence for such period as the court thinks fit. Section 2 of the Act of 1933 gives a right to the convicted person to apply, after six months have expired since the conviction, for the removal of the disqualification, a power additional to the right of appeal specifically given by s. 1 upon the conviction.

By s. 2 of the Protection of Animals Act, 1911, a court may, with the consent of the owner or without it, where a veterinary surgeon gives the necessary evidence, order the destruction of an animal on conviction of its owner for cruelty, if it will be cruel to keep it alive. The expenses of destroying it may be recovered from the owner. There is no appeal against an order for destruction (Magistrates' Courts Act, 1952, s. 83 (3) (*c*)). If there were, the animal would be kept lingering in pain until the appeal could be heard.

By s. 12 of the Protection of Animals Act, 1911, a police officer may arrest without warrant any person who he has reason to believe is guilty of an offence of cruelty to an animal, whether upon his own view thereof or upon the complaint and information of any other person who shall declare his name and place of abode to the officer. The offence of cruelty, however, must be one that is punishable with imprisonment (see *infra*). This power of arrest does not extend to private persons or to officers of the Royal Society for the Prevention of Cruelty to Animals, and any person who sees an animal being cruelly treated should fetch a constable as soon as possible. It is not clear whether a constable may enter on private property without the consent of the owner under this section.

By s. 11 a police officer may destroy any horse, mule, ass, bull, cow, sheep, goat or pig which he finds to be so diseased or severely injured or in such physical condition that there is no possibility of removing it without cruelty and, if the owner does not consent to the slaughter, it may be slaughtered on a certificate being given by a veterinary surgeon (if one resides within a reasonable distance) that to keep it alive would be cruel. The expense, including the surgeon's fee and the cost of removing it if it is on a highway, may be recovered from the owner. If the surgeon certifies that the animal can be removed without cruelty, the person in charge must cause it to be removed and, if he fails to do so, the police officer may have it removed. The police powers are not, it seems, limited to animals found on public land or highways and, if a police officer is lawfully on private land and there finds a suffering animal of the kind mentioned, he may take the steps outlined above when the animal is not in a place where it can receive proper attention.

The Riding Establishments Act, 1939, authorises the inspection of stables and premises at which horses are kept to be let out on hire for riding. The inspection is by a veterinary surgeon on behalf of the local authority (the Common Council of the City of London, the London County Council, town and urban district councils where they have a population of 20,000 or more, and, in other areas, county councils). There is no power under this Act to grant or revoke licences for, or forbid the running of, riding establishments, but the local authority (and no one else) may prosecute for the use or keeping of unfit horses in connection with the business of the establishment. This power to prosecute is, of course, additional to the power of any person to take proceedings for cruelty.

The Performing Animals (Regulation) Act, 1925, requires the registration with the local authority (the Common Council of the City of London, county and county borough councils) of persons who exhibit or train performing animals. On conviction of an offence of cruelty or of an offence under the Act, the name of the convicted person may be removed from the register and he may be permanently or for a specified time disqualified from being registered (s. 4 (2)). Further, by s. 2 (1), where it is proved to the satisfaction of a magistrates' court, on complaint being made by a constable or an officer of a local authority, that the training or exhibition of any performing animal has been accompanied by cruelty, the court may make an order on the person against whom the complaint is made prohibiting the training or exhibition or imposing conditions in regard thereto. There is a penalty of £50 for disobedience to such an order as well as the possibility of the registration being cancelled. Constables and officers of the local authority may, under s. 3, inspect premises at which performing animals are trained or exhibited or kept for training or exhibition, though they may not go behind the stage during a public performance. By s. 7, the Act does not apply to the training of animals for bona fide military, police, agricultural or sporting purposes or the exhibition of any animals so trained.

The Pet Animals Act, 1951, requires the licensing by the local authority (the Common Council of the City of London, Metropolitan borough, county borough, borough, urban and rural district councils) of the business of a pet shop, i.e., the carrying on at premises of any nature (including a private

house) of the business of selling or keeping for sale animals as pets. The Act does not, however, apply to the keeping or selling of pedigree animals. Animals may not be sold in streets or public places as pets, except at a store or barrow in a market. Officers of the local authority, and veterinary surgeons acting on behalf of the authority, may inspect pet shops. On conviction of an offence under the Act or one of cruelty, the licence may be revoked and the former holder disqualified from keeping a pet shop for such period as the court directs.

Vivisection is controlled pursuant to the Cruelty to Animals Act, 1876; it may only be done by a person licensed by the Home Secretary and the licence may require that the place where experiments are carried out shall be registered. The Act provides for the inspection of registered places by persons appointed by the Home Secretary and also prescribes a number of conditions subject to which experiments and operations must be performed. A prosecution against a licensed person can be brought only with the assent of the Home Secretary.

Turning to offences of cruelty, these will almost always fall within the Protection of Animals Act, 1911, s. 1, which reads as follows:—

"(1) If any person—

(*a*) shall cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate, or terrify any animal, or shall cause or procure, or, being the owner, permit any animal to be so used, or shall, by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, cause any unnecessary suffering, or, being the owner, permit any unnecessary suffering to be so caused to any animal; or

(*b*) shall convey or carry, or cause or procure, or, being the owner, permit to be conveyed or carried, any animal in such manner or position as to cause that animal any unnecessary suffering; or

(*c*) shall cause, procure, or assist at the fighting or baiting of any animal; or shall keep, use, manage, or act or assist in the management of, any premises or place for the purpose, or partly for the purpose of fighting or baiting any animal, or shall permit any premises or place to be so kept, managed, or used, or shall receive, or cause or procure any person to receive, money for the admission of any person to such premises or place; or

(*d*) shall wilfully, without any reasonable cause or excuse, administer, or cause or procure, or being the owner permit, such administration of, any poisonous or injurious drug or substance to any animal, or shall wilfully, without any reasonable cause or excuse, cause any such substance to be taken by any animal; or

(*e*) shall subject, or cause or procure, or being the owner permit, to be subjected, any animal to any operation which is performed without due care and humanity;

such person shall be guilty of an offence of cruelty within the meaning of this Act, and shall be liable upon summary conviction [to a fine of £25 and/or three months' imprisonment].

(2) For the purposes of this section, an owner shall be deemed to have permitted cruelty within the meaning of this Act if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom:

Provided that, where an owner is convicted of permitting cruelty within the meaning of this Act by reason only of his having failed to exercise such care and supervision, he shall not be liable to imprisonment without the option of a fine.

(3) Nothing in this section shall render illegal any act lawfully done under the Cruelty to Animals Act, 1876, or shall apply—

(*a*) to the commission or omission of any act in the course of the destruction, or the preparation for destruction, of any animal as food for mankind, unless such destruction or preparation was accompanied by the infliction of unnecessary suffering; or

(*b*) to the coursing or hunting of any captive animal, unless such animal is liberated in an injured, mutilated, or exhausted condition; but a captive animal shall not, for the purposes of this section, be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control, and a captive animal shall not be deemed to be coursed or hunted within the meaning of this subsection if it is coursed or hunted in an enclosed space from which it has no reasonable chance of escape."

"Animal," by s. 15, means any domestic or captive animal. "Domestic animal" means any horse, pony, ass, mule, bull, cow, ox, sheep, pig, goat, dog, cat, cock, hen, chicken, turkey, goose, duck, guinea-fowl, peacock, swan or pigeon (and the male and female and young of each of those species where not specifically mentioned) and any other animal of whatsoever kind or species, and whether a quadruped or not, which is tamed or which has been or is being sufficiently tamed to serve some purpose for the use of man. "Captive animal" means any animal (not being a domestic animal) of whatsoever kind or species, and whether a quadruped or not, including any bird, fish or reptile, which is in captivity or confinement or which is maimed, pinioned or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement. A wide net is cast by the Act but it will be noticed that wild animals not within the categories mentioned are not protected and it is doubtful how far wild animals which have escaped from captivity are protected during the time of their freedom. Presumably, however, the average man would not wish to inflict cruelty on tigers at large, for instance, in view of their capacity for self-defence.

There is often an outcry from the public or some sections of it at the alleged leniency shown to some offenders who have been found guilty of especially wicked forms of cruelty to animals. While it does not necessarily follow that there would be less cruelty if the maximum penalties were increased, it is somewhat surprising, in view of the strong sentiment of many people in this country against cruelty, that in 1912 Parliament reduced the period of imprisonment imposable under s. 1 of the Act of 1911 from six months to three months.

Section 1 of the Protection of Animals Act, 1911 (which has been set out above as amended), and the definition of animal are widely drawn and some of the decisions on earlier statutes are rendered of little effect as a result of the new provisions. Generally, an intention to commit deliberate cruelty need not be proved if an act which results in cruelty and suffering is done without reasonable excuse. Note, however, the special provision as to the liability of owners in s. 1 (2). Spaying sows, which makes them more useful for food, and branding lambs for the purposes of identification only, were held under earlier statutes not to be cruelty (*Lewis* v. *Fermor* (1887), 18 Q.B.D. 532; *Bowyer* v. *Morgan* (1906), 95 L.T. 27). Dishorning cattle, to make them more convenient to feed and pack, has been held in England to be

cruelty (*Ford* v. *Wiley* (1889), 23 Q.B.D. 203). This decision has not been followed in Scotland and Ireland, and the passing of the Animals (Anaesthetics) Act, 1919, which impliedly might be said to authorise dishorning under an anæsthetic, weakens it further.

Perusal of s. 1 of the Act of 1911 will show that wantonly or unreasonably omitting to do, as well as committing, any act whereby unnecessary suffering is caused to an animal is now an offence. This provision is aimed against such actions as failing to feed animals, keeping harness or ropes on them which chafe a sore place, or keeping animals which need exercise continually confined.

By s. 4 of the Protection of Animals Act, 1911, where any person has, by cruelty to an animal, done or caused damage or injury to the animal or to any person or property, he may, on conviction, be ordered to pay compensation to the person aggrieved, not exceeding £10 in amount. The award of compensation under s. 4 by a magistrates' court shall not, by proviso (*a*) to that section, prevent the taking of any other proceedings in respect of such damage or injury, so, however, that a person shall not twice be proceeded against in respect of the same claim. *Quære* whether this means that, if magistrates have awarded compensation, however inadequate, the injured party cannot proceed for the balance of the compensation in a civil court.

The provisions of the Protection of Animals Act are in addition to those of the Malicious Damage Act, 1861. By s. 40 of the Act of 1861 the malicious killing, wounding or maiming of cattle is punishable with fourteen years' imprisonment, and by s. 41 there is a penalty of six months' imprisonment for maliciously killing, maiming or wounding any dog, bird, beast or other animal not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose. The provisions of the Protection of Animals Act outlined above as to deprivation of ownership, destruction of the animal and compensation would appear to apply to convictions under the Malicious Damage Act which involve cruelty; an offence against the Act of 1861 involving cruelty would not seem to justify action in relation to disqualification from holding a dog licence but the revocation of registration or licences under the Performing Animals (Regulation) Act, 1925, and the Pet Animals Act, 1951, is allowed.

Solicitors who seek further information on the law relating to cruelty to animals will find it in "The Law Relating to Animals," by Professor Glanville Williams, in Halsbury's Laws of England (Simonds Edition), vol. 1, and Stone's Justices' Manual, 85th ed., pp. 388–439, 509–15 (relating to birds only) and 1796–7 (relating to the Malicious Damage Act).

G. S. W.

COMMON GOOD TRUSTS

In the terms of reference of the Nathan Committee on Charitable Trusts emphasis was laid on the consideration of changes in the law and practice (taxation apart) which would be necessary to enable the maximum benefit to the community to be derived from such trusts. With the major recommendations made by the committee in implementation of these terms our readers will already be familiar—the statutory rescue of some imperfectly expressed trust instruments, the rather nebulous improvement suggested in the legal definition of charity, the relaxation of the *cy-près* doctrine, the recording of trusts and various administrative suggestions. But the committee's report is not all law, and its recommendations go beyond legal technicalities. In particular Pt. III of the report addresses itself to matters of policy, and among these one of general interest is the question of "Common Good Trusts." This is a subject carrying some implications which the committee found to be outside the scope of its inquiry, so that to put the matter in perspective, and to discern exactly where it stands at the present day, it is desirable to bring under review a little recent social history.

For the inquiry undertaken by Lord Nathan's Committee was only one stage in a series of events manifesting a kind of revivalism in the field of social welfare. The campaign took its most effective shape so far in a debate initiated in the House of Lords in June, 1949, by Viscount Samuel on a motion "to call attention to the need for the encouragement of voluntary action to promote social progress." "Voluntary action" had been the title of a book written by Lord Beveridge which had appeared in the previous year. It is a wider term than charity: Lord Beveridge in the debate said that it meant action not directed or controlled by the State, in other words private enterprise for social progress. It was impossible to make a good society without it, that is to say, by a simple combination of State action and the pursuit by the individual of his personal selfish interests.

Lord Samuel began by describing the voluntary organisations of many kinds which might on any evening be found meeting in scores of committees in any large industrial town "busily engaged in the service of some kind of organisation which they regard as of public value." The fact that his lordship specifically mentioned trade union branches and political parties shows that he was intending to encompass the broadest of vistas. He was also concerned with the means of occupying leisure, with "facilities for recreation and for the enjoyment of amenities of every kind." After a reference to the fact that the Government had been finding considerable additional funds for the Universities, the Arts Council and the Travel Association, and to the setting up by local authorities of community centres, Lord Samuel indicated that he had a suggestion to make which would not impose any fresh obligation on public funds. The suggestion was that the Government should introduce legislation providing for the establishment of common good funds "nationally in Scotland, England and Wales and locally in any town or county which desired to have one established." So far as England and Wales are concerned the Nathan Committee has endorsed this suggestion: Scotland was outside its terms of reference, but it must come into our picture to some extent because the common good fund is in inception, and in the strict sense of the term still is, a Scottish institution.

No doubt a Sassenach is incapable of fully understanding such mysteries, but the Common Good, in Scotland, appears to be a fund or corpus of property held by the magistrates or town council of a Royal Burgh (or under statute a town of some other kind) "in trust for behoof of the community." Originating centuries ago, for the most part in Crown grants of land for the general financing of municipal obligations, the funds have come (since the spread of the rating system, we imagine) to be regarded as applicable for almost any public local purpose which is not provided for from the rates or other funds. There have been many additions to the original funds—by bequests or fresh grants—while the principles of Scots law which govern the application of the property and its income have been statutorily extended or restricted in particular cases. Some common good property

is alienable for the debts of the burgh, but public buildings and some other immovables dedicated by grant are inalienable. The Court of Session recently explained (*M'Dougal's Trustees* v. *Lord Advocate* [1952] S.C. 260) that the common good is owned by the community, the town council holding it simply as managers and agents "as representing the community," and not as trustees. The corollary of this is that it is not all municipal property even of a permanent character which is held as common good; a special trust in the municipality may be established if the appropriate form of grant is used (*Magistrates of Banff* [1944] S.C. 36).

Separate annual accounts of the common good must be passed, and it is possible, as *Kemp* v. *Glasgow Corporation* [1920] A.C. 836 shows, for a burgess to impeach the application of money from it to a purpose which is contrary to public policy. At the same time the speeches of their lordships in the same case indicate that the corporation of a burgh has a wide discretion over the uses to which the funds may be applied. It is pertinent to remember in the present context that the English law of charity is not shared by Scotland except as regards the Income Tax Acts. The improper purpose in *Kemp's* case was the support of particular candidates at municipal elections in neighbouring burghs; some purposes, cited to the Nathan Committee, which have been held legitimate include the maintenance of fish markets, hospitality, kirking of council and the expenses of executions.

The committee drew, too, on an example from across the Atlantic. Its report refers to a modern phenomenon in the United States of America known as the Community Trust, a form of local charitable foundation apparently established at the instance of the banks. Donors there had their benefactions held by local bankers as custodians; the bankers formed committees among themselves to secure administrative economy and unification of investment policy; and a pool resulted which, subject to the terms of any particular gift or bequest, was in practice applicable primarily for the benefit of the people of the locality in question. In the fully developed community trust, a separate body of management trustees (not bankers) is usually to be found and they are empowered by the declaration of trust to make distributions, ordinarily through other agencies, for (to take an example quoted by the committee) such charitable purposes as will in their opinion "best make for the mental, moral, intellectual and physical improvement, assistance and relief of the inhabitants" of the district. Gifts may be accepted for particular objects, but power is reserved to the trustees to redirect such gifts in case the specific object becomes unnecessary, undesirable or impracticable.

Such are the models on which the English common good trusts suggested by Lord Samuel, and favoured by the Nathan Committee, would be fashioned. No slavish imitation of either the Scottish or the American institution is suggested. The committee makes this clear, and it may be taken that Lord Samuel's mention of them is purely illustrative. His lordship wanted his new trust to be able to subsidise any kind of public amenity for which money was not otherwise available, provided that it was of a non-controversial character. It is not certain that Lord Samuel was at first referring only to such objects as were legally charities, but the committee has naturally had to approach the matter somewhat more narrowly in this respect. That is no doubt why its backing of Lord Samuel appears to be in some degree qualified. It does not recommend that common good trusts should be set up by Act of Parliament or by any public authority, but prefers that they should come into being spontaneously. Subject to this reservation it is strongly in favour of local and national common good trusts. There is, of course, as the committee reminds us, nothing in the present scheme of things to prevent any donor founding a charitable trust on the lines contemplated, and indeed some bodies which answer the description are already in existence, notably the Birmingham Common Good Trust. The committee would favour the giving of exclusive recognition as local common good trusts to charitable foundations which satisfied a number of conditions as to objects, management and activities. The nature of the trust's activities would be relevant owing to the desirability of avoiding competition and overlapping with other charities.

An important general question which has not been neglected in the discussions is that of the source of the funds for the proposed common good trusts. Lord Samuel referred initially to a substantial number of people with large or small fortunes who, having no family and no special cause at heart, were not quite sure what they ought to do with their property in their wills. Once established, a common good trust could be expected to attract many gifts from such people and could employ them better than if an equivalent amount were widely dispersed. Bequests of this kind and similar contributions would form the bulk of the fund, Lord Samuel has later suggested. But there were two other possible sources which he named in his original speech. One consisted of the large balances of unclaimed moneys lying on deposit at banks, in Chancery and in various charities scattered throughout the country. The other was property going under present law to the Crown as *bona vacantia* on the death without relatives of an intestate. The committee has not been concerned with all the aspects of this problem. The committee's report deals with certain dormant charity funds and with *bona vacantia*. So far as concerns the former, while it is not in favour of the wholesale sweeping up of trusts into regional pools or common good trusts, it *would* so gather together funds subject to certain recent invalid instruments, and (with the consent of the trustees) certain endowments no longer fulfilling a useful purpose. *Bona vacantia* it thinks should be transferred by the Government in proportions annually to the national common good trusts for England and Wales, in addition to an initial sum from the Exchequer to enable each of those national trusts to make an effective start. The national trusts are not thought likely to attract so many bequests as the local ones.

In the debate in the House of Lords last July in which the Nathan Report was discussed, there were peers who spoke against the tapping of some of these suggested sources of common good trust money, besides some who thought the whole idea of sponsoring more such trusts might carry its own dangers for the present habit of testamentary beneficence. Lord Rennell pointed out the impossibility of discovering easily whether a dormant bank account was a dead account and so available for the purpose in point, to which Lord Samuel's reply was that it would be possible to provide on an actuarial basis for possible claims. The Lord Chancellor gave no encouragement to the proposal for the appropriation of dormant public funds or *bona vacantia*. Unclaimed funds, leaving aside amounts in the hands of the clearing banks, go at present to the National Debt Commissioners, as does ultimately the estate of an intestate without kin, and the Lord Chancellor could not see why balances should be taken from the banks while companies and ordinary debtors could retain unclaimed dividends and debts.

It was very clear from Lord Samuel's speech in reply to the debate what importance, as part of the whole movement for voluntary action, his lordship and others attach to this proposal of common good trusts. There is some apprehension among charities already well established of competition from

the new neighbours. But, if the Nathan Committee's scheme is adopted, this fear should be greatly lessened on consideration of the conditions proposed for recognition of a local common good trust by the Charity Commissioners. The ideal seems to be that the trust should aim at making its existence known, but should not canvass for funds. Moreover, it will normally carry out at least part of its objects by giving to particular existing bodies financial assistance which they might not otherwise receive. And, unpopular though the observation may be in some quarters, we think Lord Samuel may be right when he says that no one can claim a vested interest in philanthropy, and that the claims of the various organisations must depend upon their merits.

Nevertheless, it seems possible at the moment that the project may languish because of some division of counsel over the manner of its initiation. Neither the committee nor the Lord Chancellor regards legislation as necessary for the actual inception of the scheme. An Act would certainly be needed if it were decided to carry out the appropriation of *bona vacantia* or unclaimed balances or both, or to adopt the committee's plan for control and recognition. But the Lord Chancellor has confirmed that there is no difficulty about setting up a local or even a national common good trust in England or Wales " if citizens so minded decided upon that course." On the other hand Lord Samuel has insisted to the last on the need for a really authoritative body—" a public institution . . . which would appeal to the whole nation." It is plainly to the Legislature that he was looking for a lead.

J. F. J.

HERE AND THERE

SCOTS-ENGLISH PARALLEL

THE deliberately manufactured antiquarian quaintness of the Law Courts in the Strand tends to blur the recollection of the fact that they were built to house something altogether new in the administration of English justice. The novelty was accepted provided it put itself into a sort of mediæval fancy dress. It is as if one of the new steamships had only been tolerated on condition that it was designed to look like a sailing ship. The new courts built round a central hall, supposed to recall the design of the upper church at Assisi, were intended to provide a not too violent contrast with the Gothic glories of Westminster Hall, the seed-bed which had nurtured the beginnings of English justice. After the great burning of the Palace of Westminster in the eighteen-thirties and between its rebuilding and the eventual departure of the lawyers for their Strand workshop, the judges sat in a somewhat haphazard collection of new courts leading off from the great Hall which had somehow managed to survive. Now, if you want to recapture something of the flavour of practice at the English Bar as it must have been in those days, the best thing you can do is to go to Edinburgh, where you will find some quite remarkable parallels, for Victorian times brought the Scots neither a new model administration of justice nor a brand-new Palace of Justice, and their courts remained clustering round the great Hall where the Scottish Parliament used to meet before the English Parliament boa-constricted it in the reign of Queen Anne. And just as, briefed or not briefed, the entire Bar of England used to transfer itself daily from its chambers to Westminster to ply, duly robed, on the professional " cab-rank," so the Bar of Scotland assembles daily in the Parliament House.

THE PARLIAMENT HALL

THE core of the Parliament House is the great Hall built about 1636, a long, spacious chamber with a magnificently complicated timber roof, a highly polished parquet floor and three great fireplaces spaced along one side. It is the Scottish legal portrait gallery where paintings and sculptures of successive generations of lawyers fill every available space on and along the walls. Tall emblazoned windows light it from one side and an enormous stained glass window (of a bad period) almost fills one of the end walls with an episode in the reign of one of the early Scottish kings ; owing to some defect in the staining, His Majesty and his attendants have complexions of Abyssinian darkness. In this Hall it was, of course, that Claverhouse addressed the Lords of Convention before his gallant adventure of raising the Highlands for James II. Like Westminster Hall, it was at one time in the eighteenth century partly occupied by traders' booths. In the early nineteenth century, Edinburgh set about improving the Parliament House according to the neo-classical taste of the day, so that the old Hall was engulfed and externally almost completely masked amid surrounding buildings. In a way, it is a pity that well was not left alone, but, if one did not happen to know that something unique had been spoilt, one would have no regrets about the present stone façade, grey, severe and symmetrical, curving round in approximately the shape of a half oval, with the pavement before it protected by an arcade. St. Giles's Cathedral closes in the space before it and between the two stands an equestrian statue of Charles II, habited in Roman armour with an angel's head on the front of his breastplate and a fiend's head on the back. Here, then, is the home of the law of Scotland. Here the judges sit and here are the headquarters both of the Faculty of Advocates and of the two principal societies of solicitors, the Writers to the Signet and the Solicitors to the Supreme Court.

LIFE ROUND THE HALL

IN Scotland, of course, there are no Inns of Court and no system of chamber practice. The Bar's work is done either at home or at the courts. Every day their papers, packed in brown leather bags of approximately the same shape and size as the red and blue bags of the English Bar, are collected from their homes and taken to the Parliament House to await their arrival. In the robing room beside the main entrance they put on wigs and gowns identical with those of English barristers, but bands are unknown, the juniors wearing white dress ties and the Queen's Counsel " falls," a broad linen cravat hanging down approximately to watch-chain level. All their activities revolve around the great Hall. Along one side of it runs a long white corridor, rather narrow and very high. On both sides, it is lined with wooden dispatch boxes each bearing a brass plate with its owner's name, and in these the advocates keep their papers during the day ; they are never locked. On the other side of the Hall are the library rooms in which the advocates can work in quiet. Beneath the great window in the Hall is a sort of low wooden pulpit to which the ushers (or rather " macers ") of the various courts come to call on the cases and to set ringing bells in different parts of the building, rather like the division bells in the Houses of Parliament. The Hall and the corridor with the advocates' boxes are a scene of constant activity with a ceaseless coming and going of professional clients, lay clients, witnesses, attendants, macers and clerks. Four clerks negotiate the professional engagements of the entire Bar of Scotland. Upstairs there is a small coffee room where the barristers not engaged in court meet and gossip in the morning. Nearby there is a long white luncheon room, where, according to custom, the same groups of men always meet to eat at the same tables. At the far end of the great Hall (away from the courts) the Writers to the Signet have their rooms, vast, formal, ponderously pillared in the classical style of the early nineteenth century. These originally belonged to the

Faculty of Advocates, who parted with them in a period of financial crisis. In another part of the building, the Solicitors to the Supreme Court have their rooms designed in an over-elaborate Victorian Renaissance style.

THE COURTS

THE courts, situated in a maze of corridors, all exhibit the heavy classical style of the early nineteenth century applied with a straightforward homely plainness. There are the first instance courts of the Outer House, as it is called, and the two appeal courts, the First Division and the Second Division of the Inner House, presided over respectively by the Lord President and the Lord Justice-Clerk. For criminal cases there is the Justiciary Court, manned by all the judges. When doing civil work the judges wear ample purple robes decorated on the front with red crosses. They wear exactly the same sort of wigs as the Bar. For criminal work, they wear scarlet robes with a white silk cape incorporating what looks like a kind of academic hood. The first instance courts are mostly much the same size as those in the English Law Courts, though some are smaller. Some have jury boxes and some do not. (The jury is far more often called in here in civil cases than in England.) The seats for counsel, solicitors and public are all on one level, not tiered, and the main lighting comes from skylight windows. Queen's counsel and juniors sit together in the same row. The witness-boxes have little curved sounding boards. The shorthand-writer sits next to the judge. The macer is robed like junior counsel, but without the wig. The panelling is painted brown. The Inner House courts are plain but spacious. The raised places of the judges are set on a broad graceful curve. The benches in the body of the court are tiered. The windows are tall and the gallery for the public is a great balcony, like a theatre's. The design of the Justiciary Court is similar save that counsel sit, not in the benches, but at a table just below the judges' seats. The judges of the Inner House often help with the work of first instance. There are no Masters to manage "back-room" procedure work as in England; their function is performed by the judges in open court. The Scottish Bar is small and there are proportionately fewer women among the advocates than in England, though one of them was the first to get "silk" in Great Britain. The way of life in the Parliament House produces a generous, friendly, "family party" atmosphere, a straightforward, intimate relationship not so readily fostered by the segregations of the English chamber system.

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Preliminary Enquiries: A Standard Form

Sir,—The letter published in the 28th November issue of THE SOLICITORS' JOURNAL from the Managing Director of The Solicitors' Law Stationery Society shows how very much the Society has our interests at heart in matters of day-to-day practical matters. But it also shows a certain attitude of—if I may so allege with respect—cure rather than prevention.

Preliminary enquiries are (to state the obvious) points raised by a purchaser's solicitor either immediately before, or more usually after, submission of a draft contract to him, and frequently approval of the draft is delayed until satisfactory replies have been received.

Would it not save a considerable amount of delay if a statement of the facts be forwarded with the draft contract, and preferably even forming a part of it. It is easier (I speak from practical experience) to obtain from the vendor replies to all anticipated enquiries when initially taking instructions, than to obtain the replies after enquiries have been raised, incurring superfluous correspondence, telephone, and more probably personal attendances on the vendor. Additionally, of course, if incorporated in the contract, the statement could form a warranty of the facts stated. This may possibly lead to even vaguer answers than the present forms of preliminary enquiries attract but would enable and require the vendor's own information to be supplied where appropriate. Points requiring further elucidation could be dealt with independently or upon space for the purpose provided on the form of statement.

I should be very pleased if the Society could discuss this point and I look forward to hearing their views.

Ruislip. "TITUS."

Change of Infant's Name on Mother's Remarriage

Sir,—I was interested in the reply given to a "Points in Practice" query on the change of the surname of an infant to that of his step-father on the remarriage of his mother [*ante*, p. 801].

The methods mentioned would leave the infant's birth certificate unchanged whereas this, probably the most embarrassing incident on a change of name, can be avoided by the step-father and mother jointly adopting the infant.

A short birth certificate (price 9d.) can then be used for school purposes without necessitating any explanation and the cost will be less than for an enrolled deed poll and advertisement.

Houghton-le-Spring. AUBREY A. GORDON.

Sir,—Referring to the question of change of name by an infant raised in your "Points in Practice" (SOLICITORS' JOURNAL, 21st November, 1953), your correspondent may like to consider yet another alternative, namely, the mother and step-father adopting the child. We were recently confronted with the same problem and it appears to us that this is the easiest and most satisfactory way out of the difficulty.

Our client was also concerned about the birth certificate and difficulties at school, and in our experience we find that adoption provides the answer; the only snag, if such it be, is the delay which occurs by reason of the three months' notice which must be given to the Welfare Authority.

Poole. DICKINSON, MANSER & CO.

[While adoption is a possibility to be considered in such cases, it may affect property rights and will have other consequences going far beyond the mere change of name which was the subject of the question. It is surely surprising to suggest that the procedure by way of adoption is less expensive than executing and enrolling a deed poll.—ED.]

Figures in Affidavits

Sir,—Why is it that judges seem unable to resist the temptation to have a "dig" at members of the junior branch of the profession? I note that Mr. Justice Wynn Parry refused to continue the hearing of a Chancery action because sums of money mentioned in affidavits were expressed in words and not in figures. He further ordered the plaintiffs to pay the costs occasioned by the adjournment. Has the learned judge ever had to run an office under modern conditions? It is difficult enough for solicitors to carry on their business at all to-day, and I suggest it is a matter for regret that the judges should thus go out of their way to increase solicitors' difficulties.

Bath. GEO. E. HUGHES.

MR. A. T. CHITTOCK

Mr. Aubrey Thorn Chittock, M.B.E., solicitor, of Norwich, died on 3rd December, aged 77. He was admitted in 1901.

MR. S. HAWORTH

Mr. Sydney Haworth, solicitor, of Southport and Liverpool, died recently, aged 41. He was admitted in 1933.

MR. C. T. HOLLAND

Mr. Charles Thomas Holland, solicitor, of Westminster, S.W.1, died on 28th November, aged 73. He was admitted in 1924.

MR. R. SAMBLE

Mr. Read Samble, solicitor, of Burton-on-Trent, died on 3rd December, aged 76. He was admitted in 1899.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

COURT OF APPEAL

COMPANY LIQUIDATION: WHETHER FOREIGN TAX A PROVABLE LIABILITY

***In re* Delhi Electric Supply and Traction Co., Ltd.**

Evershed, M.R., Jenkins and Morris, L.JJ. 10th November, 1953

Appeal from Vaisey, J.

The Government of India sought to prove in the voluntary liquidation of the Delhi Electric Supply and Traction Co., Ltd., a company trading in India but registered in the United Kingdom, for a sum due in respect of income tax, including capital gains tax, which arose on the sale of the company's undertaking in India. The greater part of the proceeds of the sale had been transferred to the United Kingdom before the Act of the Indian Legislature imposing the tax came into force; and before the first assessment was made on the company, the remainder of the proceeds had been so transferred and the company had already gone into voluntary liquidation. When the proofs of debt were made by the Government of India, the liquidator rejected them on the ground that they were for foreign tax, and on application being made to the judge by the Government of India, Vaisey, J., upheld the liquidator's decision. The Government of India appealed.

EVERSHED, M.R., said that the claim was unenforceable in England, for there was a well-recognised rule, first stated explicitly by Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, and recognised ever since, being applied in recent times in *In re Visser* [1928] Ch. 877 and *Kahler* v. *Midland Bank, Ltd.* [1950] A.C. 24, that the courts of the United Kingdom have no jurisdiction to enforce the revenue laws of a foreign State. There was no valid distinction for this purpose between foreign States and States adhering to the British Commonwealth. It was said for the Government of India that although the claim, if that rule was applied, was unenforceable in the courts yet in a voluntary liquidation of the company it was a "liability" for which a liquidator was required to provide in the liquidation of a company by s. 302 of the Companies Act, 1948, being a trustee under the statute in favour of the Government of India. But that, his lordship said, was not so. "Liability" was used in a wide sense but it nevertheless excluded claims which were not enforceable in the courts of this country, and since the company was being wound up in the United Kingdom the meaning must be construed according to English law, for, *prima facie*, the rules governing the administration of an estate, whether of a company or a deceased person, are those of the *lex fori*. An analogous case on this point was *In re Lorillard* [1922] 2 Ch. 638.

JENKINS, L.J., and MORRIS, L.J., agreed. Appeal dismissed. Leave to appeal.

APPEARANCES: *N. E. Mustoe*, Q.C., and *Robert Phillips* (*Stanley Johnson & Allen*); *Raymond Jennings*, Q.C., and *Oliver Smith* (*Sanderson, Lee & Co.*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [3 W.L.R. 1085

PRACTICE: VERDICT OF JURY TAKEN IN JUDGE'S ABSENCE: VALIDITY: UNDESIRABILITY

Hawksley *v.* Fewtrell and Another

Singleton, Birkett and Hodson, L.JJ. 16th November, 1953

Appeal from Finnemore, J.

In a civil action with a jury, the trial judge, with the consent of counsel on both sides, directed the jury generally to find for the plaintiff or for the defendants. The jury retired to consider their verdict and returned in the late afternoon. The judge was not present, having left the court and also the precincts, and the verdict of the jury, for the defendants, was taken by the associate of the court, who then discharged them. On the next sitting day, when the defendants asked for formal judgment to be entered for them, counsel for the plaintiff objected that the verdict taken in the judge's absence was a privy verdict only and could not be made final in any way since the jury had been discharged. The judge replied that there was a long-standing practice by which plain verdicts could be so taken in civil actions by the associate and formal judgment entered later, and he proposed to follow that practice. He directed that judgment be entered for the defendants. The plaintiff appealed.

SINGLETON, L.J., on a review of the authorities, said that it seemed that for general convenience there had existed for a long time a practice in civil cases in which an officer of the court had taken the verdict of a jury in the absence of the judge. He would not like to think that it was a general practice in any sense, but in the absence of any other ground the court ought not to hold that a verdict so taken was a nullity. He would dismiss the appeal.

BIRKETT, L.J., agreed. The term "privy verdict" could not properly be applied to the verdict returned in the present circumstances, where there was a clear inference that the judge had given the associate instructions before leaving the court, and where everything which had taken place would have been precisely the same if the judge had been present. The further argument for the plaintiff had been that the verdict must be returned in open court, which meant the judge sitting in open court; but, in his view, the term "open court" was customarily used to emphasise the publicity of English judicial proceedings.

HODSON, L.J., agreed. He said that these matters, including the relief of juries, had developed on historical lines, and it was clear that since the eighteenth century the practice of the courts had been to regard the giving of the verdict to the associate in the judge's absence as a recognisable practice.

Appeal dismissed. Leave to appeal refused.

APPEARANCES: *H. V. Lloyd-Jones*, Q.C., and *Leonard Halpern* (*T. D. Jones & Co.*); *Richard Elwes*, Q.C., and *W. W. Stabb* (*T. MacDonald Baker*).

[Reported by Miss M. M. HILL, Barrister-at-Law] [3 W.L.R. 1070

NEGLIGENCE: COLLISION BETWEEN TWO VEHICLES IN CENTRE OF STRAIGHT ROAD: NO EVIDENCE OF CAUSE: BOTH EQUALLY TO BLAME

Baker *v.* Market Harborough Industrial Co-operative Society, Ltd. Wallace *v.* Richards (Leicester), Ltd.

Somervell, Denning and Romer, L.JJ. 26th November, 1953

Appeals from Ormerod and Sellers, JJ.

In January, 1952, when it was dark, a motor lorry driven by the husband of the first plaintiff, Mrs. Baker, collided on a straight road with an Austin van, the driver of which was the husband of the second plaintiff, Mrs. Wallace. Both drivers were killed. The two vehicles had collided whilst the offside front wheel of one or the other, or perhaps of both, was over the "cat's eyes" marking the centre of the road. In an action heard at Leicester Assizes in February, 1953, before Ormerod, J., Mrs. Baker claimed damages from the owners of the van, alleging negligence on the part of their deceased driver. Judgment was given for the defendants, the judge finding that the plaintiff had failed to prove negligence on the part of Wallace, the driver of the van. In a separate action brought at Leicester Assizes in May, 1953, and tried by Sellers, J., Mrs. Wallace sued the owners of the lorry driven by the deceased Baker, also alleging negligence. In that action, in which the evidence was substantially the same as in the earlier one, Sellers, J., found that both drivers were guilty of negligence and apportioned the blame equally between them. The plaintiff in the first action and the defendant in the second action appealed.

SOMERVELL, L.J., said that he agreed with the observation of Sellers, J., that when two vehicles were descending hills on a straight road in opposite directions and met at the bottom, the inference was that they were both to blame because, in the absence of other evidence, it appeared that the drivers were committing the same negligent acts, failing to keep a look-out and failing to drive their vehicles on the correct side. He would therefore dismiss the appeal from Sellers, J., and allow the appeal from Ormerod, J., to the extent of 50 per cent. of the damage.

DENNING, L.J., agreeing, said that, if there had been a passenger in one of the vehicles who was injured, he could have brought actions against both defendants, and the court would not, simply because it could not say whether one or both vehicles were to blame, refuse to give compensation. A collision called for an explanation; if the drivers were alive, and neither gave evidence, the court would unhesitatingly hold them both to blame. So, too, when both were dead and could not give evidence.

ROMER, L.J., agreed. Appeal from Ormerod, J., allowed. Appeal from Sellers, J., dismissed.

APPEARANCES: *Gilbert Paull*, Q.C., and *J. P. Stimson* (*Gregory, Rowcliffe & Co.*, for *A. Denham Foxon*, Leicester); *F. W. Beney*,

Q.C., and *M. K. Harrison-Hall* (*Reid Sharman & Co.*, for *Toller, Son & Hales*, Kettering); *P. O'Connor and N. MacDermot* (*Hewitt, Woollacott & Chown*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1472

CHANCERY DIVISION

LANDLORD AND TENANT: LIQUIDATION OF COMPANY HOLDING LEASE: ASSIGNMENT OF LEASE FOR VALUE: CLAIM BY LESSOR TO HAVE ASSETS SET ASIDE TO MEET FUTURE LIABILITIES UNDER LEASE

***In re* House Property and Investment Co., Ltd.**

Roxburgh, J. 13th November, 1953

Adjourned summons.

A lessor demised valuable property at less than a rack-rent to a company for a term of ninety years. Soon afterwards the company went into voluntary liquidation and assigned, with the lessor's consent, the lease to its parent company. Later, the parent company passed a resolution for voluntary winding up, and in the liquidation assigned, for value with consent, its leasehold interest to a substantial assignee. The assets available for distribution were in excess of £2,000,000. The lessor declined to accept rent from the assignee and took out a summons in which he claimed that there should be sufficient assets set aside in the liquidation to meet all future liabilities for rent and for the performance of the lessee's covenants; alternatively, he claimed the right to prove in the winding up in respect of the company's liabilities under the lease.

ROXBURGH, J., said that on the liquidation the lessor would lose something of value. The company had very large assets; the lease was far from onerous, or of a type which the liquidator would want to disclaim; it had, in fact, been assigned for substantial consideration. The first question was whether the lessor had an absolute right to have a sum set aside. If so, that was an end of the case; if not, the next question was whether there was jurisdiction to set aside a sum. If so, the third question was whether such an order ought to be made. Finally, if all the questions were decided against the lessor, it was common ground that he had a right to prove in the winding up. In *James Smith and Sons (Norwood), Ltd.* v. *Goodman* [1936] Ch. 216 a liquidator completed a winding up and distributed the assets of a company without making provision for a possible future liability under certain leases which the company had assigned. It was held that he ought to have admitted the liability to proof, and that he was liable in damages to the lessors for having failed to do so. During the argument, Lord Hanworth, M.R., had observed that to set aside assets to meet future liabilities was a possible course for the protection of the lessor, but not one to which he had an absolute right. The point was not fully argued in that case, and interlocutory observations were not of binding authority, but he would not be prepared to hold that Lord Hanworth's observation was wrong. The first conclusion was accordingly that there was no absolute right, but that it was a possible course. There had been a number of cases in which a lessor of a company being wound up had been held entitled to enter a claim for future rent and granted an injunction to restrain the company from distributing its assets without making proper provision for him; but in none of these cases had the lease been assigned for value. The strongest case for the present lessor was the Scottish case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332. There, a company which was in difficulties went into liquidation; the liquidator sold the assets and assigned two leases to another company. An important point in considering that case was that, under the law of Scotland, unlike that of England, a lessee was discharged from liability if he assigned his lease, having the right to do so, or if the lessor accepted an assignee as tenant. The lessor claimed declarator that the old company were still liable to fulfil their obligations and liabilities under the assigned contracts, and that the liquidators were bound to set aside sufficient assets to meet them as they became due; he thus reprobated the assignments. The Court of Session dismissed the action and left the lessor to prefer his claims in the liquidation, observing that the case did not justify resort to "an extraordinary remedy." In the House of Lords, Lord Watson said that it was not an "extraordinary remedy" for a lessor to seek to prevent the liquidator from dividing surplus assets without making any provision to meet his claims. All that case decided was that, when there was no assignee liable, a fund shall be set aside. In English law, and in the present case, there was a fundamental difference, in that there was an assignee who was liable. There was no absolute rule that where there had been an assignment for value the landlord was entitled as of right to have a fund set aside. Under present circumstances, in view of the authorities and of the introduction of the right of disclaimer of onerous leases, it was very unlikely, though not impossible, that such an order might be made. In the present case it would be quite wrong to make such an order. The lease was very valuable, being at much under the rack-rent, and had been assigned for a large sum and there was no precedent for the order prayed in the case of such an assignment. If once such a practice was incorporated into the law, it would lend itself to terrible abuse. Under the Companies Act, 1948, it was the right of a solvent company to wind up; that was part of the policy of the law of England. It was also the policy of the Act that the liquidator should deal with the liabilities and distribute the surplus assets in a reasonable time; such policy would abhor the continuation of a liquidation for seventy years, in the way suggested, for the benefit of a landlord. It would be to make the company purchase its statutory right to wind up by the sacrifice of a large sum. What the lessor was demanding was not his bond but a better bond. If such a rule applied to a rich company, such as the present, it would also apply to an impecunious company holding a valuable lease, whose security, as a going concern, might be almost worthless, while that of the assignee, based on the value of the property, would, in the business sense, be good. Accordingly, the lessor must be left to his right to prove in the winding up. Declaration accordingly.

APPEARANCES: *Millard Tucker*, Q.C., *R. J. T. Gibson* and *R. R. D. Phillips* (*Rider, Heaton, Meredith & Mills*); *Ingress Bell*, Q.C., and *R. Walton* (*Slaughter & May*); *R. Goff*, Q.C., and *L. J. Morris Smith* (*Julius White & Bywaters*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [3 W.L.R. 1037

QUEEN'S BENCH DIVISION

ARBITRATION CLAUSE IN CONTRACT: TIME LIMIT FOR CLAIM: JURISDICTION OF ARBITRATOR

Smeaton Hanscomb & Co., Ltd. *v.* Sassoon I. Setty, Son & Co

Devlin, J. 19th November, 1953

Special case stated by an arbitrator.

On 22nd May, 1951, a contract in writing was made between Smeaton Hanscomb & Co., Ltd., as buyers, and Sassoon I. Setty, Son & Co., as sellers, for the sale of about 35 tons of round mahogany logs. The contract, which contained certain provisions as to quality and size, fixed the price at £24 per ton f.o.b. Lagos. It provided for shipment to Liverpool of the goods, which were on the high seas at the time the contract was made. The contract contained the following clause: "Should any dispute arise with respect to any matter connected with this contract, the buyers shall nevertheless accept the goods as shipped and make due payment as already provided; such payment, however, shall not affect their right, if any, to claim compensation for breach of this contract by the sellers. Such difference shall be referred to arbitration . . . Any claim must be made within fourteen days from the final discharge of the goods and before they are removed." The ship reached Liverpool on 27th May, 1951, and final discharge was completed on 6th June. Twenty-one logs were discharged in purported fulfilment of the contract. The buyers arranged for Arthur Dobell & Co. to measure and grade the logs at Liverpool. Their specification, dated 3rd July, disclosed a shortage of measure and a serious percentage undergrade. On 12th or 13th July the buyers complained of the quality of the logs, and on 16th July they claimed by letter to reject the consignment and to have returned to them the price which they had paid against the documents before the ship arrived. The buyers appointed an arbitrator, who was later appointed sole arbitrator, as the sellers made no appointment. He made his award substantially in favour of the buyers subject to certain questions for the consideration of the court, the first question being whether the buyers were entitled to maintain a claim against the sellers.

DEVLIN, J., reading his judgment, said that counsel for the buyers had submitted that the sellers could only rely on the clause in question if they had delivered goods which corresponded with the contract description. The goods which the sellers had delivered, however, were described throughout as round mahogany logs and the arbitrator had found that there was a shortage in measure as well as a serious percentage undergrade.

That finding was not, in his view, sufficient to bring into operation the principle on which counsel had relied. It had been further argued on behalf of the buyers that such clauses fell within one or other of two categories: they were either true limitation clauses which barred the claim for all purposes, or they had no effect except in conjunction with the arbitration clause, and the object of the clause was merely to fix a limit to the time within which the party aggrieved might claim to enjoy the benefits of arbitration. He (his lordship) did not think that all clauses of that type must be placed in one or other of those categories. He thought that the authorities accepted a third category (*Ayscough* v. *Sheed, Thomson & Co.* (1924), 40 T.L.R. 707, and *Pinnock Bros.* v. *Lewis and Peat, Ltd.* [1923] 1 K.B. 690). There was no reason why such a clause should not be worded so as to provide that a limitation point should not deprive the arbitrator of jurisdiction, and that it should be for him and not for the court to determine the point finally, so far as it was a question of fact. The arbitrator's finding (subject to a case stated) was conclusive, whether he treated the question as a limitation point or as one going to his jurisdiction. Judgment for the sellers.

APPEARANCES: *Adrian Hamilton* (*Parker, Garrett & Co.*); *J. P. Widgery* (*William A. Crump & Son*).

[Reported by Miss SHEILA COBON, Barrister-at-Law.] **[1 W.L.R. 1468**

SURVEY OF THE WEEK

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time :—

Charitable Trusts (Validation) Bill [H.L.] [1st December.

To validate under the law of England and Wales, and restrict to charitable objects, certain instruments taking effect before the sixteenth day of December, nineteen hundred and fifty-two, and providing for property to be held or applied for objects partly but not exclusively charitable, and to enable corresponding provision to be made by the Parliament of Northern Ireland.

Expiring Laws Continuance Bill [H.C.] [2nd December.

National Service (Conscientious Objectors) Bill [H.L.] [3rd December.

To make provision for persons claiming to have conscientious objection to performing part-time service under Part I of the National Service Act, 1948.

Read Second Time :—

Air Corporations Bill [H.C.] [3rd December.

Food and Drugs (Scotland) Bill [H.L.] [3rd December.

National Museum of Antiquities of Scotland Bill [H.L.] [3rd December.

Read Third Time :—

Licensing (Seamen's Canteens) Bill [H.L.] [1st December.

Post Office and Telegraph (Money) Bill [H.C.] [3rd December.

Public Works Loans Bill [H.C.] [3rd December.

Statute Law Revision Bill [H.L.] [1st December.

In Committee :—

Protection of Birds Bill [H.L.] [1st December.

B. DEBATES

On the third reading of the **Statute Law Revision Bill,** the LORD CHANCELLOR said he was advised that consolidation of the Tithe Acts would be a very big task and would not be worth while in view of the small area of their operation. All that remained was a residuum of antique rights such as "gated and stinted pasture" and "corn rents," and so on. It was hoped to abolish most of these oddities under a power to do so given in the Act of 1936. [1st December.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Rights of Entry (Gas and Electricity Boards) Bill [H.C.] [2nd December.

To regulate the exercise of statutory rights of entry by or on behalf of Gas Boards and Electricity Boards, and for purposes connected with the matter aforesaid.

Read Second Time :—

Currency and Bank Notes Bill [H.C.] [3rd December.

Electoral Registers Bill [H.C.] [3rd December.

Housing Repairs and Rents Bill [H.C.] [1st December.

Read Third Time :—

Armed Forces (Housing Loans) Bill [H.C.] [3rd December.

Navy, Army and Air Force Reserves Bill [H.C.] [3rd December.

In Committee :—

Cinematograph Film Production (Special Loans) Bill [H.C.] [3rd December.

B. HIGH COURT SUBPŒNAS (MR. SPEAKER'S STATEMENT)

Mr. HAROLD WILSON said that he had been served with a subpœna at 8.30 p.m. to attend at the High Court at 10.30 a.m. the following day and to remain in court from day to day. He was required to give evidence in a case of which he had no knowledge and with which he had no direct or indirect connection. It was clear to him that compliance with this subpœna would be inconsistent with his duties as a member. It would appear that there was widespread ignorance in the legal profession as regards the privilege of Members of Parliament in the matter of subpœnas, and a declaration thereon by the Speaker would help to make the position clear.

The SPEAKER said he had, in Mr. Wilson's case, sent a letter to the learned judge asking if he would intervene to postpone or set aside the subpœna. This would, he had told the judge, obviate the more formal and cumbrous step refusing leave of absence from the House for the member to attend court on the day in question, in view of the fact that members of both Houses were, by law and custom of Parliament, exempted from attendance as witnesses during the sessions of Parliament.

[On 3rd December Mr. Speaker read a letter addressed to him by a firm of London solicitors apologising for the issue of the subpœna. The House accepted the apology.] [1st December.

C. QUESTIONS

LEGAL AID COSTS (SECURITY)

Mr. A. J. IRVINE asked whether, in view of the number of cases which had been certified by the legal aid committee as being appropriate to High Court proceedings and were nevertheless remitted to the county courts on an order by the master requiring the assisted person to give security for costs, regulations would be made under s. 12 (2) (*b*) (ii) of the Legal Aid and Advice Act, 1949, to deal with this situation and enable the assisted person to go, with proper safeguards if needs be, to the legal aid fund if security were required.

The ATTORNEY-GENERAL said that the position regarding security for costs in a case in which legal aid had been granted was governed by the ordinary law. He would, however, look into the circumstances raised by the member. [30th November.

NEW TOWN CORPORATIONS (LAND ACQUISITION)

Mr. MARPLES said it was not yet possible to authorise new town corporations to pay agreed claims for loss of development value in all cases of acquisition of land, whether by agreement or by compulsion. Where land was acquired compulsorily and the compensation could not be settled by agreement, the basis of assessment remained fixed by the Town and Country Planning Act, 1947, until that should be amended. There were also some cases where the amount payable on the claim for loss of development value could not be determined in advance of further legislation. For the most part, however, public authorities, including the new town corporations, were free to pay the amount of the agreed claim relating to the land in addition to the existing use value. [1st December.

HOUSING ACTS (LOANS)

Mr. MARPLES stated that, in consultation with the local authority associations and the Building Societies Association, the Minister of Housing and Local Government was endeavouring to make arrangements for wider knowledge of the powers of local authorities under the Housing Acts to make loans to persons wishing to acquire or build houses for their own occupation so as to enable them to make the necessary deposits with building societies. Local authorities also had power to guarantee loans made by building societies. [1st December.

" PRINCESS VICTORIA " LOSS (JUDGMENT FINDINGS)

Mr. LENNOX-BOYD said that the main findings of the Lord Chief Justice in the High Court of Northern Ireland in the appeal of the British Transport Commission were that the " Princess Victoria " was lost because of the inadequacy of her stern doors and of the arrangements for freeing water from the car space and because of the shifting cargo. The Commission had announced that it did not intend to dispute liability or to seek to limit liability under the Merchant Shipping Acts. [2nd December.

AGRICULTURE ACT, 1947 (NOTICES TO QUIT)

Sir THOMAS DUGDALE, whilst rejecting a suggestion that legislation should be introduced to prevent a landowner giving notice to quit each year when the application had been rejected on more than one occasion by the Agricultural Land Tribunal, stated that he was considering an amendment which would empower an Agricultural Land Tribunal, when it saw special reasons for doing so, to require the payment of costs by a person concerned in a reference to it. [3rd December.

DISPOSSESSED FARMERS (COMPENSATION)

Sir THOMAS DUGDALE stated that an owner who was dispossessed for bad estate management received the value of his land, whilst an owner/occupier who was dispossessed on grounds of bad husbandry retained the ownership of his land and got a rent from his future tenant. He had no power in either of these cases, or with an ordinary tenant farmer, to offer in addition compensation for loss of livelihood on dispossession from land. [3rd December.

SEXUAL OFFENCES (STATISTICS)

The HOME SECRETARY gave the following figures :—

Year	*Unnatural offences*	*Attempts to commit unnatural offences*	*Gross indecency*
1938 ..	134	822	320
1952 ..	670	4,087	1,686

(The figure for attempts included indecent assaults on male persons and cases of importuning for immoral purposes dealt with on indictment. Similar figures for offences of importuning by males for immoral purposes which were dealt with summarily were not available.) [3rd December.

SEXUAL OFFENCES (ROYAL COMMISSION)

Sir DAVID MAXWELL FYFE, in reply to a request that a Royal Commission should be appointed to examine the laws relating to sexual offences, and in particular homosexual offences, said the general question of this branch of the law and of the treatment of sexual offenders was engaging his attention, but he was not yet in a position to make a statement. [3rd December.

MENTAL DEFICIENCY ACT (EXAMINATION OF CHILDREN)

The HOME SECRETARY said s. 9 of the Mental Deficiency Act, 1913, empowered him to order the transfer to a suitable institution, or the placing under guardianship, of a child detained in an approved school, or, in certain circumstances, in a remand home, if he was satisfied from the certificates of two qualified medical practitioners that the child was a defective. Such certificates were considered most carefully by the Home Office before any action was taken on them. He was prepared to give favourable consideration to requests by parents for an examination by a doctor of their own choice where there was reason to think that a further opinion would be of value. [3rd December.

HOMOSEXUALITY PROSECUTIONS (LONDON)

The HOME SECRETARY gave the following details: In the Metropolitan police district in 1952, 36 persons were prosecuted for unnatural offences and 35 persons were convicted; 144 persons were prosecuted for attempts to commit unnatural offences (including indecent assaults on male persons and cases of importuning for immoral purposes dealt with on indictment) and 135 persons were convicted; 121 persons were prosecuted for offences of gross indecency and 113 persons were convicted. In addition, summary proceedings were instituted against 373 persons for importuning for immoral purposes and against 196 persons under local regulations and byelaws for offences of indecency in parks, commons and open spaces; particulars of the number of convictions for these offences were not available. [3rd December.

STATUTORY INSTRUMENTS

Additional Import Duties (No. 3) Order, 1953. (S.I. 1953 No. 1736.) 6d.

Baking Wages Council (Scotland) Wages Regulation Order, 1953. (S.I. 1953 No. 1701.) 8d.

Birmingham-Great Yarmouth Trunk Road (Hockering Diversion) Order, 1953. (S.I. 1953 No. 1731.)

Conveyance of Government Explosives in Harbours Regulations, 1953. (S.I. 1953 No. 1703.) 8d.

County Court (Amendment) Rules, 1953. (S.I. 1953 No. 1728 (L. 13).) 8d.
As to these rules, see p. 838, *ante*.

County Court Funds Rules, 1953. (S.I. 1953 No. 1710 (L. 11).) 11d.
As to these rules, see p. 838, *ante*.

County of Monmouth (Electoral Divisions) Order, 1953. (S.I. 1953 No. 1730.)

Folkestone-Brighton-Southampton-Dorchester-Honiton Trunk Road (Shirley Link Road) Order, 1953. (S.I. 1953 No. 1717.)

Import Duties (Drawback) (No. 13) Order, 1953. (S.I. 1953 No. 1707.)

Keighley (Amendment of Local Enactment) Order, 1953. (S.I. 1953 No. 1723.)

London-Tilbury Trunk Road (Tilbury Docks Approach Road) Order, 1953. (S.I. 1953 No. 1720.)

Matrimonial Causes (District Registries) Order, 1953. (S.I. 1953 No. 1727 (L. 12).)
By this order any matrimonial cause or matter may, on and after 1st January next, be commenced in the Guildford District Registry established by S.I. 1953 No. 1679 (see *ante*, p. 835).

Meat (Rationing) (Amendment No. 5) Order, 1953. (S.I. 1953 No. 1729.)

Purchase Tax (No. 5) Order, 1953. (S.I. 1953 No. 1706.) 6d.

Retail Bespoke Tailoring Wages Council (England and Wales) Wages Regulation (Holidays) Order, 1953. (S.I. 1953 No. 1712.) 6d.

Safeguarding of Industries (Exemption) (No. 9) Order, 1953. (S.I. 1953 No. 1725.)

Starch and Dextrine (Revocation) Order, 1953. (S.I. 1953 No. 1735.)

Stopping up of Highways (Devonshire) (No. 2) Order, 1953. (S.I. 1953 No. 1721.)

Stopping up of Highways (East Riding of Yorkshire) (No. 2) Order, 1953. (S.I. 1953 No. 1716.)

Stopping up of Highways (Lincoln–Parts of Lindsey) (No. 2) Order, 1953. (S.I. 1953 No. 1713.)

Stopping up of Highways (Nottinghamshire) (No. 2) Order, 1953. (S.I. 1953 No. 1715.)

Stopping up of Highways (Staffordshire) (No. 5) Order, 1953. (S.I. 1953 No. 1714.)

Ware Potatoes (Amendment) Order, 1953. (S.I. 1953 No. 1734.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

AMALGAMATION OF DERBY AND LEICESTER RENT TRIBUNALS

The existing rent tribunals with offices at Derby and Leicester will be amalgamated from 1st January, 1954. The Minister of Housing and Local Government has made the following appointments to the new tribunal: Chairman, Mr. L. E. Rumsey; Member and Reserve Chairman, Councillor J. Harrison; Member, Mr. J. W. Oldham; Reserve Members, Mrs. L. R. Marriott, J.P., Mr. J. H. Husbands, Mr. C. Lilley, Mr. W. C. Edmonds, Mr. J. J. Clist and Mrs. J. M. Furness. The office of the new tribunal will be at the County Court Building, St. Peter's Churchyard, Derby. Telephone No. Derby 46655.

BOOKS RECEIVED

Notable British Trials Series. Volume 79. The Trial of Jeannie Donald. Edited by JOHN G. WILSON, B.A. (Oxon), LL.B., Advocate. 1953. pp. 305. London, Edinburgh, Glasgow: William Hodge & Co., Ltd. 15s. net.

Everybody's Book on Wills and Intestacies (Applicable to England and Wales). By ROBERT S. W. POLLARD, L.A.M.T.P.I., J.P. 1953. pp. (with Index) 48. London: Charles Skilton, Ltd. 3s. 6d. net.

Road Haulage Licensing. By T. D. CORPE, O.B.E., Solicitor of the Supreme Court. 1953. pp. xvi and (with Index) 315. London: Sweet & Maxwell, Ltd. £1 15s. net.

The Lawyer's Companion and Diary, 1954. 108th year of publication. Editors: ERNEST L. BUCK and LESLIE C. E. TURNER. 1953. pp. 1565 and Diary. London: Stevens and Sons, Ltd., and Shaw & Sons, Ltd. £1 5s. net.

A Current Digest of the Law Affecting Accountancy. 1953. pp. 75. London: The Incorporated Accountants' Research Committee. 5s. net.

"Current Law" Income Tax Acts Service [CLITAS]. Releases 11, 12, 13 and 14. 1953. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. Edinburgh: W. Green & Son, Ltd.

University of London Legal Series—I: Public Policy. By DENNIS LLOYD, M.A., LL.B., of the Inner Temple, Barrister-at-Law, Reader in English Law in the University of London. 1953. pp. xxii and (with Index) 166. London: University of London, The Athlone Press. 18s. net.

University of London Legal Series—II: Status in the Common Law. By R. H. GRAVESON, Professor of Law and Dean of the Faculty of Laws in the University of London. 1953. pp. xxiv and (with Index) 151. London: University of London, The Athlone Press. 18s. net.

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 102-103 Fetter Lane, E.C.4, and contain the name and address of the subscriber, and a stamped, addressed envelope.

Trustee—REMOVAL OF ONE WHO HAS NOT ACCEPTED—VALIDITY OF APPOINTMENT OF SUCCESSOR

Q. By his will *W L* appointed *R L*, *W B L* and *F J L* executors and trustees thereof and declared that if either of his trustees should die or remain out of the United Kingdom for more than twelve months it should be obligatory on the surviving or continuing trustees to appoint immediately another fit person to act as a trustee in his place, and devised all his freehold property upon trust for *R L* for life with certain remainders over. By a second codicil *W L* appointed *M L L* as an additional executor and trustee. *W L* died in 1906, and his will was proved by *W B L* and *M L L*, power being reserved to the other two executors. *F J L* later died without proving. In 1935 *M L L* died and in 1937 *W B L* by deed appointed *C O* as a new trustee in the place of *M L L* deceased to act with the said *W B L*. In 1940 *C O* died and by a deed dated in September, 1949, *W B L* appointed *P M C* to be a new trustee to act with the said *W B L*. This deed recited, *inter alia*: (1) the testator *W L's* will; (2) that the settled real property was then vested in *R L* as tenant for life under the provisions of the Law of Property Act, 1925; (3) death of *C O*; (4) that *R L* had for the past forty-three years resided out of the United Kingdom; and (5) that *W B L* was desirous of appointing *P M C* in the place of *R L*. The deed then witnessed that in exercise of the power contained in the will and of every other power *W B L* appointed *P M C* as a new trustee to act with *W B L* in the place of *R L* and, in fulfilment of the obligation and in exercise of the power conferred by the Trustee Act, 1925, and of every other power, he also appointed *P M C* to be a new trustee of the testator's will to act jointly with him for the purposes of the Settled Land Act, 1925. A vesting deed was executed by *W B L* and *P M C* in December, 1951, whereby after reciting the will and subsequent events, these two trustees declared that the real property was vested in *R L* as tenant for life in fee simple and declared that *W B L* and *P M C* were the trustees for the purposes of the Settled Land Act, 1925. In July last *R L* as tenant for life sold the real property and he and the trustees conveyed it to a purchaser, *P*, in the usual way in fee simple. *P* has now agreed to sell a part of the property, and his solicitors have submitted that the appointment of *P M C* in the place of *R L* was not in order, that the clause in the testator's will does not apply because *R L*, who did not prove the will, was neither a trustee of the will nor a trustee for the purposes of the Settled Land Act, and that as power was reserved to him he can still come in and prove the will notwithstanding the attempt to put him on the retired list. *R L* has been in America for forty-three years and is domiciled there. It is apprehended that by virtue of s. 40 of the Trustee Act, 1925, the deed of appointment of September, 1949, may be valid, and operated to vest in the new trustees (*W B L* and *P M C*) all the estate interest and rights of the appointor (*W B L*) in the property, and the fact that the deed stated that *P M C* was appointed a new trustee in the place of *R L* instead of in the place of *C O* is not actually material so far as the present purchaser is concerned. Do you consider the last appointment good, and, if not, is a deed of rectification and a new vesting deed considered to be necessary?

A. The question raised appears to be quite novel and never to have been the subject of a judicial decision. In the first place, the question whether *R L* can be removed from a trusteeship which he has never accepted would appear to be logically answerable in the negative. *Ward* v. *Butler* (1824), 2 Mol. 533, shows that if a person is appointed executor and trustee of a will and accepts the office of executor, he also accepts that of trustee. Further, in *Re Arbib and Class's Contract* [1891] 1 Ch. 601 a testator nominated a person who was living in Australia to be one of his trustees in the event of his return to England. Some years after the testator's death, the Australian trustee paid a temporary visit to England and, there being no evidence of an actual disclaimer, was held to have become a trustee of the will, with the result that title to real estate could not be made by the other trustees. We do not consider that s. 40 of the Trustee Act, 1925, assists, inasmuch as subs. (1) of that section presupposes the appointment to be valid, which cannot be the case in the present instance unless the removal of *R L* was also valid. Also, we do not think that it is correct to say that a purchaser is not concerned with the deed of appointment. The principal vesting deed of 1951 was for the purpose of giving effect to a settlement subsisting at the commencement of the Settled Land Act, 1925, and accordingly, under s. 110 (2) of that Act, a purchaser is concerned to see that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees of the settlement. In our opinion the proper course is for *R L* to renounce probate and to disclaim the trust and, when this has been done, for an application to be made to the court for confirmation of the appointment of *P M C*.

Personal Representative—LEASEHOLDS—EXTENT OF PERSONAL LIABILITY FOR RENT AND PERFORMANCE OF COVENANTS—ENTRY INTO POSSESSION

Q. I am acting in an estate where there are leaseholds, of which the executors are in possession. The question has arisen as to the indemnity (which will be provided by insurance) to which the executors are entitled on selling the leaseholds or on vesting them in beneficiaries. *Re Owers* [1941] Ch. 389 necessitates a division into two categories of liability, namely, the liability of the executors "as such," and their personal liability. Provided that all claims which have accrued and been claimed at the date of disposition are met, it seems that the executors' liability "as such" is dischargeable under s. 26 of the Trustee Act, 1925. Do you consider that *Re Bennett* [1943] 1 All E.R. 467 is authority for saying that all personal liability is also dischargeable under s. 26 of the Trustee Act, 1925, when the executors relinquish possession, or do you consider that it is simply too late to ask for an indemnity against personal liability *after* the assent has been made? Assuming that the personal liability is not dischargeable under s. 26 on a sale or vesting, what is the extent of the personal liability? From para. 435 of vol. 20 (p. 360) of Halsbury's Laws of England, 2nd ed., it seems that the liability arises in respect of rent accruing due and breaches of covenant committed only during the time that the executors have been in possession, but it is appreciated that reference is there made

to the liability arising in consequence of privity of estate between the lessor and an ordinary assignee and not between the lessor and the lessee's personal representatives. Do you consider that the personal liability is in respect of breaches of covenant from the commencement of the lease to the time the executors relinquish possession ?

A. We agree, upon the authority of *Re Owers* [1941] Ch. 389, that the liability of executors " as such " is capable of discharge under s. 26 of the Trustee Act, 1925. It is, however, essential for them to retain a fund or procure indemnity by an insurance policy as suggested by our subscriber or in some other way if they have become personally liable on the covenants by reason of having entered into possession. We do not consider that *Re Bennett* [1943] 1 All E.R. 467 indicates that s. 26 of the Trustee Act, 1925, protects personal representatives in respect of such personal liability : see Emmet on Title, 13th ed., vol. 2, p. 1140. That case decided that a personal representative could not recall or seek indemnity out of property in respect of which he had executed an assent, but it does not appear to prevent an executor obtaining security in any other way, as, for example, by the retention of other property, notwithstanding that such security is asked for by him in respect of property which is the subject of a bequest to which he has already assented. We conceive that it would be in order for the personal representative to refuse to execute an assent in respect of that other property, until security for liability on the assented property had been given. The personal liability for rent of a personal representative who has entered into possession of leaseholds is limited to the actual value of the property from the time of his taking possession (*Patten* v. *Reid* (1862), 6 L.T. 281 ; *Re Bowes ; Strathmore (Earl)* v. *Vane* (1887), 37 Ch. D. 128 ; 57 L.J. Ch. 455 ; *Minford* v. *Carse* [1912] 2 Ir. R. 245). In the case of liability on the covenant to repair (and, *semble*, other covenants, except that for payment of rent) the personal representative's liability is not so limited and his obligation extends to want of repair which accrued before the death (*Tremeere* v. *Morison* (1834), 1 Bing. N.C. 89 ; 3 L.J.C.P. 260 ; *Sleap* v. *Newman* (1862), 12 C.B. (N.S.) 116 ; *Rendall* v. *Andreae* (1892), 61 L.J.Q.B. 630). See generally Woodfall's Law of Landlord and Tenant, 24th ed., pp. 881–889.

NOTES AND NEWS

Honours and Appointments

The Anglo-Saxon office of Townreeve of Bungay (Suffolk) was, on 1st December, conferred on Mr. PERCY J. SPRAKE, solicitor, of Bungay. The position is somewhat like that of a mayor, but carries unique local privileges.

Mr. GEORGE WILLIAM TURNER PITT, an assistant solicitor with Manchester Corporation, was recently appointed prosecuting solicitor to Huddersfield Corporation.

Miscellaneous

CIVIL CLAIMS AGAINST MEMBERS OF THE UNITED STATES AIR FORCE

The Lord Chancellor's Office has issued the following statement :—

In a notice issued in July, 1953 [see *ante*, p. 513], details were given of the procedure to be followed by persons having claims in contract or tort against members of the U.S. Air Force in this country. In the case of claims in tort, the procedure described applies only to cases where the act complained of was not committed in the course of duty.

Where the claimant is in doubt as to whether the tort has been committed in the course of an airman's duty, his first step should be to consult the Staff Judge Advocate of the unit concerned or the Staff Judge Advocate at Headquarters, U.S. Third Air Force, Victoria Park Estates, South Ruislip, Middlesex.

Claims relating to torts committed in the course of duty are dealt with by the U.S. Air Force Foreign Claims Commission. In such cases the claims should be forwarded to the U.S. Claims Officer at the nearest U.S. Air Force base.

In the case of claims relating to acts committed outside the course of duty, the proper course is for the claimant to proceed against the airman concerned with a view to obtaining judgment in the event of liability being denied. If liability is admitted or judgment is obtained, but the claimant nevertheless fails to obtain satisfaction within a reasonable time, he should without delay send a copy of the airman's written admission or, as the case may be, a copy of the judgment to the Staff Judge Advocate, Headquarters, U.S. Third Air Force.

In any case where a member of the U.S. armed forces has wilfully failed to pay a just debt which he has admitted, or has wilfully failed to satisfy a judgment against him, such wilful failure constitutes an offence against U.S. military law. The U.S. authorities will, in appropriate cases, take disciplinary action against a serviceman who wilfully or dishonourably fails to meet his undisputed personal obligations. The policy of the U.S. armed forces is to encourage all members of the service to conduct their financial affairs in such a manner as to reflect credit upon the service. It is stressed, however, that U.S. military authorities have no power to order payment or to make deductions from pay. The possibility of disciplinary action for wilful failure to discharge an undisputed obligation does, however, have a deterrent effect on service debtors.

In certain cases the U.S. Claims Commission will, where the claimant has failed to obtain satisfaction, be prepared to consider whether an *ex gratia* payment might be made even though the act complained of was not committed in the course of duty.

Whether the claim relates to an off-duty tort or to a tort committed in the course of duty the U.S. Claims Commission cannot undertake to pay the claimants' solicitors' charges or other costs of prosecuting his claim, notwithstanding that the costs are included in the judgment.

The U.S. Claims Commission is precluded from considering claims arising out of contract, and the procedure in regard to such claims is the same as for claims relating to torts committed outside the course of duty, i.e., if the claimant fails to obtain satisfaction, he should send a copy of any admission of the claim, or a copy of the judgment, to the Staff Judge Advocate. In no circumstances will the U.S. Claims Commission be prepared to make an *ex gratia* payment in respect of such claims.

Wills and Bequests

Mr. R. R. Ramuz, solicitor, of Southend-on-Sea, left £27,427 (£24,320 net).

SOCIETIES

The Annual General Meeting of the LEICESTER LAW SOCIETY was held on 18th November, 1953, and was well attended. The following officers were elected : President, Mr. M. H. Moss ; Vice-President, Mr. H. A. Day ; Hon. Treasurer, Mr. S. H. Partridge ; Hon. Secretary, Mr. B. E. Toland ; and Hon. Librarian, Mr. R. Herbert. It was reported that the membership of the Society is now 168. Mr. F. H. Jessop, Vice-President of The Law Society, was also present, and gave an interesting address.

THE UNION SOCIETY OF LONDON announce the following subject for debate in December, 1953 : Wednesday, 16th—Joint debate with the Oxford Union Society : " That this House has no confidence in Her Majesty's Government." Meetings are held in the Common Room, Gray's Inn, at 8 p.m.

" THE SOLICITORS' JOURNAL "

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W. N. CURTIS,
Secretary and Solicitor.

Area Headquarters,
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8th December, 1953.

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